89-1717

No. _____

IN THE
Supreme Court of the United States
October Term, 1989

STATE OF FLORIDA,

Petitioner,

v.

TERRANCE BOSTICK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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April 26, 1990

QUESTION PRESENTED

May the police, without violating the fourth amendment, board an interstate bus and ask for, and receive, consent to search a passenger's luggage where they advise the passenger that he has the right to refuse?

TABLE OF CONTENTS

TABLE OF CITATIONS

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OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 554 So.2d 1153 (Fla. 1989). The State's petition for rehearing was denied on January 29, 1990. (Pet. App. A)

The opinion of the District Court of Appeal, Fourth District of Florida, is reported at 510 So.2d 321. (Pet. App. B)

Bostick was one of six cases presenting the same issue of law. The other five cases were decided by the Florida Supreme Court by citation to the principle of law established in *Bostick.* These other five cases were initially reported at *State v. Avery,* 531 So.2d 182 (Fla. 4th DCA 1988); *Mendez v. State,* 534 So.2d 774 (Fla. 4th DCA 1988); *McBride v. State,* 535 So.2d 692 (Fla. 4th DCA 1988); *Serpa v. State,* 541 So.2d 799 (Fla. 4th DCA 1989); and *Shaw v. State,* 543 So.2d 469 (Fla. 4th DCA 1989), in the Fourth District Court of

Appeal (Pet. App. B) and at *McBride v. State*, 554 So.2d 1160 (Fla. 1988); *Mendez v. State*, 554 So.2d 1161 (Fla. 1989); *Avery v. State*, 555 So.2d 1160 (Fla. 1989); *Serpa v. State*, 555 So.2d 1210 (Fla. 1989); and *Shaw v. State*, 555 So.2d 351 (Fla. 1989), in the Florida Supreme Court. (Pet. App. C)

JURISDICTION

The Supreme Court of Florida issued its opinion on November 30, 1989, and denied rehearing on January 29, 1990. This Court has jurisdiction. 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment IV, *United States Constitution* provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . .

Amendment XIV, Section 1, *United States Constitution* provides in pertinent part:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

Article I, Section 12, *Florida Constitution*[1] provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communication by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

STATEMENT OF THE CASE

As part of drug interdiction programs, police departments in Broward and Palm Beach Counties, Florida, have a policy whereby police officers routinely but randomly board interstate buses and trains during scheduled stops. The police are prominently identified as such, advise passengers they are engaged in drug interdiction, request consent to search, and advise passengers that they may refuse consent.

A panel of the Fourth District Court of Appeal affirmed the seizure of evidence found during a consensual search of a passenger's luggage in Broward County but certified as a question of great public importance to the Florida Supreme Court:

> MAY THE POLICE WITHOUT ARTICULABLE SUSPICION BOARD A BUS AND ASK AT RANDOM, FOR, AND RECEIVE, CONSENT TO SEARCH A PASSENGER'S LUGGAGE WHERE THEY ADVISE THE PASSENGER THAT HE HAS THE RIGHT TO REFUSE CONSENT TO SEARCH?

This decision was reported as *Bostick v. State,* 510 So.2d 321 (Fla. 4th DCA 1987). (Pet. App. B)

Subsequently, a trial court in adjacent Palm Beach County found the police policy or practice to be inherently coercive and suppressed contraband seized during such a consensual search. In *State v. Avery,* 531 So.2d 182 (Fla. 4th DCA 1988)(Pet. App. B), the Fourth District Court of Appeal, sitting *en banc,* canvassed the applicable law and the specific facts and circumstances of the case and determined that there was no *per se* constitutional bar to the police policy or practice of boarding buses and trains and randomly requesting consent for such searches. The Court held that the specific facts and circumstances surrounding the incident did not show that the consent to search was coerced. Accordingly, the district court reversed the suppression order and again certified a question of great public importance to the Florida Supreme Court of whether the evidence should be suppressed "as 'coerced' upon the sole ground that the officer(s) boarded a bus (or other public transport) and randomly sought consent from passengers."

Relying on the *Avery* decision, panels of the Fourth District subsequently upheld consensual searches and seizures in a series of similar cases reported as *McBride v. State,* 535 So.2d 692 (Fla. 4th DCA 1988); *Mendez v. State,* 534 So.2d 774 (Fla. 4th DCA 1988); *Serpa v. State,* 541 So.2d 799 (Fla. 4th DCA 1989); and *Shaw v. State,* 543 So.2d 469 (Fla. 4th DCA 1989)(Pet. App. B).

Subsequently, the Florida Supreme Court accepted *Bostick, Avery, Mendez, McBride, Serpa* and *Shaw* for review. *Bostick* was treated as the lead case. The court decided that the police policy and practice of routinely boarding buses and trains and randomly seeking consent to search luggage was inherently coercive, which constituted a seizure and violated the fourth amendment prohibition against

unreasonable searches and seizures. Based on this bright line rule, the court suppressed the evidence in all six cases reported as *Bostick v. State,* 554 So.2d 1153 (Fla. 1989)(Pet. App. A); *Avery v. State,* 555 So.2d 1160 (Fla. 1989)(Pet. App. C); *McBride v. State,* 554 So.2d 1160 (Fla. 1989)(Pet. App. C); *Mendez v. State,* 554 So.2d 1161 (Fla. 1989)(Pet. App. C); *Serpa v. State,* 555 So.2d 1210 (Fla. 1989)(Pet. App. C); and *Shaw v. State,* 555 So.2d 351 (Fla. 1989)(Pet. App. C). The State of Florida's petition for rehearing (Pet. App. A) was denied on January 29, 1990.

REASON FOR GRANTING THE WRIT

THE POLICE MAY, WITHOUT VIOLATING THE FOURTH AMENDMENT, BOARD A BUS AND ASK FOR, AND RECEIVE, CONSENT TO SEARCH A PASSENGER'S LUGGAGE WHERE THEY ADVISE THE PASSENGER THAT HE HAS THE RIGHT TO REFUSE.

The terms of Article I, section 12 of the Florida Constitution, explicitly make the search and seizure provision of the state constitution congruent with those of the United States Constitution. The decision here thus rests on the United States Constitution and decisions of this Court control the issue.

The decision below holds that the fourth amendment prohibits police from boarding buses and trains during scheduled stops and seeking consent of passengers to search their luggage. This decision conflicts with decisions of this Court, decisions of the United States Courts of Appeals, and decisions of the appellate courts of other states.

This Court has held that properly conducted consensual searches are constitutionally permissible, that the question of whether a consent is voluntary is a question of fact to be determined from the totality of circumstances on a case-by-case basis, that there is no requirement to advise the person of the right to refuse consent, and that the fourth and fourteenth amendments do not discourage citizens from cooperating with and aiding police to the utmost of their abilities in apprehending criminals. *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). The right of the police to approach citizen passengers and request consent to conduct searches of their persons and luggage has been specifically recognized in the context of

public transportation facilities. *United States v. Mendenhall,* 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980); *reh'g denied,* 448 U.S. 908, 100 S.Ct. 3051, 65 L.Ed.2d 1138 (1980); *Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *Florida v. Rodriguez,* 469 U.S. 1, 105 S.Ct. 308, 83 L.Ed.2d 165 (1984). The critical importance of obtaining citizen cooperation in drug interdiction was clearly delineated in *United States v. Berry,* 670 F.2d 583, 594 (5th Cir. 1982):

> The interest of the government in terminating drug smuggling is, on the one hand, very substantial. The toll on our society in lives made wretched, in costs to citizens, and in profits of gross size funneled to the most odious criminals, is staggering. *See Mendenhall, supra,* 446 U.S. at 561-62, 100 S.Ct. at 1881 (Powell, J., concurring in part and concurring in the judgment); *United States v. Oates,* 560 F.2d 45, 59 (2d Cir. 1977). Compounding this burden is the difficulty in interdicting a drug trade carried on by highly organized and sophisticated syndicates that are exceptionally well funded and are dealing in an easily transportable, easily hidden commodity. Informing our police that they cannot approach citizens to enlist their voluntary support in ending this trade may be tantamount to preventing its interdiction at all.

The dissent in *Bostick* by Justice Grimes recognized and stated the controlling law:

> (GRIMES, J., dissenting) I admit to a certain amount of discomfort in the prospect of the police routinely boarding stopped buses to inquire of the passengers whether they will consent to a search of their luggage. However, I know of no legal

principle which would justify this Court in declaring the practice to be per se illegal.

The police are at liberty to approach an individual in a public place to ask him questions if the person is willing to listen. *Florida v. Royer,* 460 U.S. 491 (1983). Such an encounter only becomes a seizure if the person is detained without reasonable objective grounds for doing so. *United States v. Mendenhall,* 446 U.S. 544 (1980). The majority's suggestion that Bostick could not have felt free to leave and that in any event there was no place to go except to get off the bus is misplaced. On the facts of this case, the controlling question is whether a reasonable person would have felt free to terminate the encounter, given the totality of the circumstances. *Id.* The United States Supreme Court has said that there is no "litmus paper test" to be applied in distinguishing an encounter from a seizure. *Royer.*

In *Immigration & Naturalization Service v. Delgado,* 466 U.S. 210 (1984), the Supreme Court held that the Immigration and Naturalization Service had neither detained nor seized employees who were questioned during "factory surveys" seeking to locate illegal aliens, even though the exits were "guarded" by some agents, while other agents, armed and with walkie talkies, dispersed systematically throughout the factories to question employees. Any employees giving unsatisfactory responses to the agents' questions were then asked to produce immigration papers voluntarily. The Court stated that " '[o]nly when the officer, by means of physical force or show of authority, has restrained the liberty of a citizen may we conclude

that a "seizure" has occurred.' " *Id.* at 215 (quoting *Terry v. Ohio,* 392 U.S. 1, 19 n.16 (1968)).

The position I take is similar to that expressed by six of the nine judges of the Fourth District Court of Appeal in the en banc decision of *State v. Avery,* 531 So.2d 182, 185-86 (Fla. 4th DCA 1988):

> Law enforcement officers are not restricted from boarding buses or other public transportation with the permission of the operator. Being lawfully present, they are free to communicate with the passengers. The location where an encounter takes place — whether on a bus, in a terminal, or in a room — is certainly a factor that the trial court should consider in weighing a motion to suppress. *See I.N.S. v. Delgado; Florida v. Royer; United States v. Mendenhall.* But the determination of whether there has been a seizure, or merely an encounter which a reasonable person would feel free to terminate, remains a question of fact to be determined from the totality of the circumstances.

Whether there has been a voluntary consent is a question to be determined from the totality of the circumstances. *Royer; Mendenhall; Schneckloth v. Bustamonte,* 412 U.S. 218 (1973). The extent to which a passenger may be intimidated by the police boarding a bus and seeking permission to check his luggage properly bears on whether the consent to search has been voluntarily given. But the ultimate question of whether the consent was voluntary is a question of fact. In this case the trial

judge found that the consent to search had been voluntarily given.

I respectfully dissent. (OVERTON and McDONALD, JJ., Concur).

Because of geography and other factors, Florida is a major pipeline for illegal drugs and, thus, a particularly critical area in the nation's, and especially Florida's, efforts to combat drug smuggling. The bright line rule adopted by the *Bostick* court severely restricts the ability of police to interdict illegal drug shipments in public transportation facilities. Contrary to the decision below, the fourth amendment does not prohibit consensual encounters between police officers and citizens on intercity and interstate buses and trains.

The decision below directly conflicts with the approach taken by federal appellate courts in cases which are factually and legally indistinguishable from *Bostick*. *See, e.g., United States v. Blake,* 888 F.2d 795, (11th Cir. 1989), a case arising out of Broward County, Florida, where state police officers approached two travelers, obtained consent for a search, and seized contraband. Although the contraband was later suppressed because the scope of the consent was exceeded, the analytical approach and the propositions of law relied on directly conflict with the *Bostick* bright line rule. See legal analysis at 798:

> It has long been recognized that police officers, possessing neither reasonable suspicions nor probable cause, may nonetheless search an individual without a warrant so long as they first obtain the voluntary consent of the individual in question. *Schneckloth v. Bustamonte,* 412 U.S. 218, 92 S.Ct. 2041, 36 L.Ed.2d 854 (1973).
>
> * * *

> Whether a suspect voluntarily gave consent to a search is a question of fact to be determined by the totality of the circumstances.
>
> * * *
>
> The determination as to whether a suspect's consent is voluntary is not susceptible to neat talismanic definitions; rather, the inquiry must be conducted on a case-by-case analysis.
>
> *Id.*

Blake and *Bostick* illustrate the ultimate conflict. The constitutional propriety of actions of a Broward County deputy sheriff depends entirely on whether the subsequent criminal prosecution takes place in federal or state court, i.e., the fourth amendment has one meaning in federal court and a conflicting meaning in a Florida court. There is no discernible explanation for this conflict inasmuch as the Florida Constitution, by its terms, provides that United States Supreme Court decisions will control the application of the Florida constitutional provisions in searches and seizures. *See, also, United States v. Tavolucci,* 895 F.2d 1423 (D.C. Cir. 1990), where the court upheld the seizure of evidence and the right of the police to approach travelers on an interstate train, just as they could approach persons on streets and other public places.

The conflict also extends to appellate authorities in other state jurisdictions. In *State v. Christie,* 385 S.E.2d 181 (N.C. 1989), the Charlotte Police Department routinely boarded buses from "source cities." Without any reasonable suspicion or probable cause, the police asked passengers to consent to searches of luggage. Contrary to *Bostick,* the issue of consent was correctly analyzed using the totality of circumstances and case-by-case approach set out in the *Schneckloth* line of cases. The circumstances of *Christie* do not differ in any significant manner from those of *Bostick*.

The bright line rule of the Florida Supreme Court prohibiting the police from boarding interstate and intercity buses and trains and obtaining consent to search luggage is directly contrary to controlling case law from this Court and conflicts with decisions of federal and state appellate courts. The conflict and split in authority presents an untenable and erroneous interpretation of the fourth amendment and warrants review by this Court.

CONCLUSION

In view of the conflict of the decisions below with past decisions of this Court and the importance of the issue to national drug interdiction efforts, the Court may wish to consider summary reversal.

Respectfully submitted,

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APPENDIX

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TABLE OF CONTENTS

APPENDIX A

Supreme Court of Florida

Terrance Bostick,

Petitioner,

vs. Case No. 70,996

State of Florida,

Respondent.

(BARKETT, J.) We have for review *Bostick v. State*, 510 So.2d 321 (Fla. 4th DCA 1987), in which the district court certified the following question to be of great public importance:[1]

> May the police without articulable suspicion board a bus and ask at random, for, and receive consent to search a passenger's luggage where they advise the passenger that he has the right to refuse consent to search?

Id. at 322. We rephrase the question as follows:

> Does an impermissible seizure result when police mount a drug search on buses during scheduled stops and question boarded passengers without articulable reasons for doing so, thereby obtaining consent to search the passenger's luggage?

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1 We have discretionary jurisdiction under article V, section 3(b)(4), Florida Constitution.

We answer the certified question in the affirmative and quash the opinion of the district court.

The facts in this case are succinctly stated by Judge Letts in his dissenting opinion[2] below:

> Two [Broward County sheriff's] officers, complete with badges, insignia and one of them holding a recognizable zipper pouch, containing a pistol, boarded a bus bound from Miami to Atlanta during a stopover in Fort Lauderdale. Eyeing the passengers, the officers admittedly without articulable suspicion, picked out the defendant passenger and asked to inspect his ticket and identification. The ticket, from Miami to Atlanta, matched the defendant's identification and both were immediately returned to him as unremarkable. However, the two police officers persisted and explained their presence as narcotics agents on the lookout for illegal drugs. In pursuit of that aim, they then requested the defendant's consent to search his luggage. Needless to say, there is conflict in the evidence about whether the defendant consented to the search of the second bag in which the contraband was found and as to whether he was informed of his right to refuse consent. However, any conflict must be resolved in favor of the state, it being a question of fact decided by the trial judge.

Id. (Letts, J., dissenting in part, footnote omitted).

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2 The majority of the district court below issued a per curiam affirmance, but agreed to certify the question. Bostick v. State, 510 So.2d 321, 321-22 (Fla. 4th DCA 1987). Thus, the majority did not recite the facts of the case.

The issue in this case arises out of the perpetual conflict between, on one hand, the right of an individual to be free from governmental interference and, on the other hand, the need of the government to ensure the safety of its citizens. We start with the premise that every natural person has the inalienable right to live his or her life unimpeded by others. Each individual has the right to choose whether and with whom he or she will share personal information, conversation, or any other interaction personal to oneself. This right of personal autonomy or privacy, however, is forfeited when an individual acts to harm another. Thus, when the state has reason to believe that an individual has committed a crime, the state has the power to interfere with that individual's autonomy through a seizure or a search. However, this power must be exercised within certain constitutional constraints.

One such constraint is article I, section 12 of the Florida Constitution, and its counterpart, the fourth amendment of the United States Constitution. Both guarantee the right to be free from unreasonable searches and seizures, and both apply to all "seizures" of the person, including arrests and brief detentions. In the words of *Terry v. Ohio*, 392 U.S. 1, 19 n. 16 (1968), they apply to those situations when an "officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." As Justice Stewart wrote in *United States v. Mendenhall*, 446 U.S. 544 (1980) (plurality opinion):

> [A] person has been "seized" within the meaning of the Fourth Amendment only, if, in the view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave.

Id. at 554 (footnote omitted). A majority of the Court has since embraced this formulation. *Immigration and Naturalization Serv. v. Delgado,* 466 U.S. 210, 228 (1984).

The purpose of this admittedly imprecise test is clear: "to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation." *Michigan v. Chesternut,* 108 S.Ct. 1975, 1979 (1988). Thus, a seizure is not limited to physical custody but may be effected by "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person or citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Mendenhall,* 446 U.S. at 554.

Against the backdrop of this imprecise definition of "seizure," the courts have established a continuum by which to gauge police activity alleged to constitute an improper seizure. From this continuum have come three broad lines of case law.

The first deals with the most severe seizures, most often described as "arrests." Full-fledged arrest, usually resulting in an indefinite detention of the person, is justified only when probable cause exists. *Dunaway v. New York,* 442 U.S. 200, 208 (1979). "Probable cause" means that the circumstances are such as to cause a person of reasonable caution to believe that an offense has been or is being committed by the person to be arrested. *Id.* at 208 n. 9. The "totality of the circumstances" must yield "a particularized suspicion . . . that the particular individual being stopped is engaged in

wrongdoing."[3] *United States v. Cortez,* 449 U.S. 411, 418 (1981). Moreover, the stop must have been "justified at its inception." *United States v. Sharpe,* 470 U.S. 675, 682 (1985)(citation omitted).

The second line of cases deals with the less severe intrusions upon personal rights caused by brief, investigatory stops. Such stops fall into several categories. In *Terry,* for instance, the United States Supreme Court recognized that police may briefly stop and question those reasonably suspected of committing or about to commit a crime and frisk those reasonably suspected of carrying a weapon. *Terry,* 392 U.S. at 27. The rationale of *Terry* was that the brief intrusion upon an individual under these circumstances was counterbalanced by the government's interest in ensuring the safety of its police officers and of the public in general.

The basic rationale in *Terry* has been extended to other contexts. The Court, for example, has used it to justify brief automobile stops when police had articulable suspicion that illegal aliens were present. *Cortez,* 449 U.S. at 421. The same rationale underlies a number of decisions permitting brief stops in airport terminals of persons engaging in out-of-the-ordinary acts that usually indicate trafficking in

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3 It is irrelevant what label the government or its agents attach to a particular seizure. *Every* seizure bearing the attributes of an arrest is unreasonable and thus unlawful unless supported by probable cause, Michigan v. Summers, 452 U.S. 692, 700 (1981), even if only for the purpose of custodial interrogation. Dunaway v. New York, 442 U.S. 200 (1979).

illicit drugs.[4] *E.g., United States v. Sokolow,* 109 S.Ct. 1581 (1989).

The third line of cases involves those situations in which an individual actually consented to the police intrusion upon his or her personal rights. In these cases, the individual clearly understood that he or she could decline the police contact and continue on. If an individual chooses to speak with police and ultimately consents to a search, no "seizure" has occurred. Thus, the state has not engaged in coercion, and no fourth amendment violation exists. For instance, neither the state nor federal constitutions are offended when agents of the state approach an individual on the street or in another public place, ask questions without intimidation, and offer the *voluntary* answers to those questions into evidence in a criminal prosecution. *Florida v. Rodriguez,* 469 U.S. 1, 5-6 (1984); *Florida v. Royer,* 460 U.S. 491, 497 (1983).

In the present case, the state contends that the initial contact by Officers Nutt and Rubino never rose to the level of a stop or detention that implicated Bostick's fourth amendment interests. What did occur, the state argues, was a consensual encounter meeting all the criteria for voluntariness prescribed under *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973), and *Norman v. State, 379 So.2d 643 (Fla. 1980).*

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4 However, Terry v. Ohio, 392 U.S. 1 (1968), requires reasonable suspicion of specific wrongdoing. For instance, the Court has found unreasonable some investigatory stops based on mere presence in a neighborhood frequented by drug users, Brown v. Texas, 443 U.S. 47, 51-52 (1979), random spot checks on the public highway, Delaware v. Prouse, 440 U.S. 648, 661 (1979), the fact that a person appears to be Mexican, United States v. Brignoni-Ponce, 422 U.S. 873 (1975), and dragnets, Davis v. Mississippi, 394 U.S. 721, 726-27 (1969).

We disagree. We find, first, that Bostick in fact was "seized" by the officers and, second, that any consent he gave to search his luggage was not free from the taint of the illegal detention.

We have no doubt that the Sheriff's Department's standard procedure of "working the buses" is an investigative practice implicating the protections against unreasonable seizures of the person. U.S. Const. amend. IV; art. I, § 12, Fla. Const. There is no doubt that these protections extend to the traveling public, *see Carroll v. United States,* 267 U.S. 132, 154 (1925), including those who travel in vehicles, *Brinegar v. United States,* 338 U.S. 160, 176-77 (1949), or vehicles for hire. *See, e.g., Rios v. United States,* 364 U.S. 253 (1960) (involving taxicab). The passenger, as Professor LaFave has observed, "shares with the driver a privacy interest in continuing his travels without governmental intrusion." 3 W. LaFave, *Search and Seizure* § 11.3(e), at 571 (1978). *See also,* J. Choper , Y. Kamisar § L. Tribe, *The Supreme Court; Trends and Developments 1978-79* 160-61 (1978). Moreover, there is a well-established privacy interest in the luggage one carries during travels. *United States v. Chadwick,* 433 U.S. 1, 13 (1977); *United States v. Hernandez-Salazar,* 813 F.2d 1126, 1136 (11th Cir. 1987)(quoting *United States v. Goldstein,* 635 F.2d 356, 361 (5th Cir.), *cert. denied,* 452 US. 962 (1981)); *State v. Wells,* 539 So.2d 464, 468 (Fla.)(on rehearing), *cert. granted,* 109 S.Ct. 3183 (1989).

There also is no doubt that the setting in which the challenged police conduct occurs may provide strong evidence of a "seizure." As noted in *Chesternut,* 108 S.Ct. at 1979, "what constitutes a restraint on liberty prompting a person to conclude that he is not free to 'leave' will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs." The crucial question is whether, under all the circumstances, a reason-

able person would have believed he was not free to leave. *Mendenhall,* 446 U.S. at 554.

Here, the circumstances indicate that the officers effectively "seized" Bostick. Officer Nutt testified that he and Officer Rubino, wearing raid jackets clearly identifying them as sheriff's officers, approached Bostick during the course of the bus's momentary layover in Fort Lauderdale. Bostick, who was resting on a bag in the rearmost seat, was asked to produce his identification and indicate his destination. During questioning, Officer Nutt stood in a position that partially blocked the only possible exit from the bus. At the time, Bostick testified that Officer Nutt had his hand in a black pouch that appeared to contain a gun. Because Bostick was enroute to Atlanta, he could not leave the bus, which was soon to depart. He had only the confines of the bus in which to move about, had he felt the officers would let him do so.

Under such circumstances a reasonable traveler would not have felt that he was "free to leave" or that he was "free to disregard the questions and walk away." *Mendenhall,* 446 U.S. at 554. There was, in fact, no place to which a reasonable traveler might leave and no place to which he or she might walk away. The fact that the officers partially blocked the aisle and that one appeared to carry a gun only underscored this conclusion. Even the trial court in the proceeding below concluded that this situation was "very intimidating" for Bostick. For all intent and purpose, Bostick was detained by the activities of Officers Nutt and Rubino. Although, this detention did not rise to the level of an "arrest," it nevertheless constituted a lesser form of "seizure" of Bostick's person.

Other Florida cases involving the same Broward County policy support this conclusion. For example, under very similar facts in *Alvarez v. State,* 515 So.2d 286 (Fla. 4th DCA 1987), the Fourth District made the following comment

about the Sheriff's Department's activities in boarding Amtrak trains in Fort Lauderdale:

> [The defendant] was not in a public terminal, but rather had already boarded the train and begun his journey. To leave in the sense contemplated by Terry and Mendenhall would have required him to abandon the comfort of the sleeping berth he had paid for, and, were he to leave the train entirely, to miss his destination. His only other option was to ask the officers to leave.

Id. at 289. Thus, the Fourth District concluded that the police activity in *Alvarez* was "the functional equivalent of detention for purposes of determining the voluntary nature of the subsequent consent." *Id.* We agree with this analysis.

Since we have found a detention of Bostick, we must determine its propriety. The broad principles of federal law, as well as the specific requirements of Florida law, require that the police in this instance at a minimum must have had a reasonable articulable suspicion before they detained Bostick. *Sokolow; Cortez;* art. I, § 12, Fla. Const. There must be "specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion" of crime. *Brignoni-Ponce,* 422 U.S. at 844.

In this instance, the state concedes that it lacked any basis for suspecting illegal activity whatsoever. Thus, our inquiry is at an end. There were no articulable facts and no rational inferences to support the police activity here. The detention of Bostick was unlawful and unjustified.

Having decided that the initial confrontation was unlawful, we next consider whether Bostick's subsequent consent to search his luggage overcame the taint of the illegal police conduct. We find that it does not. As we stated in *Norman v. State,* 379 So.2d 643 (Fla. 1980):

> [W]hen consent is obtained after illegal police search or arrest, the unlawful police action presumptively taints and renders involuntary any consent to search. *The consent will be held voluntary only if there is a clear and convincing proof of an unequivocal break in the chain of illegality sufficient to dissipate the taint of prior illegal action.*

Id. at 646-7 (citations omitted, emphasis added). *Accord Bailey v. State*, 319 So.2d 22 (Fla. 1975); *State v. Martin*, 532 So.2d 95 (Fla. 4th DCA 1988); *Alvarez*, 515 So.2d at 286; *Elsleger v. State*, 503 So.2d 1367 (Fla. 4th DCA), dismissed, 511 So.2d 298 (Fla. 1987); *State v. Blan*, 489 So.2d 865 (Fla. 1st DCA 1986); *Harris v. State*, 483 So.2d 111 (Fla. 2d DCA 1986); *Tennyson v. State*, 469 So.2d 133 (Fla. 5th DCA 1985). No such clear and convincing proof exists upon this record. Indeed, the trial judge expressed his own belief that he considered the "whole picture . . . very intimidating even if there is consent." It is clear that the trial court used the wrong standard in judging this issue. An "intimidating" environment cannot be said to have broken the chain of illegality even under a less exacting standard of proof than that dictated by *Norman* and its progeny. Thus, although the judge's finding of fact normally comes to this Court with a presumption of correctness, the presumption must fail in this instance.

Accordingly, we find under the circumstances presented here, government has exceeded its power to interfere with the privacy of an individual citizen who is not even suspected of any criminal wrongdoing. Indeed, the unlawful intrusion upon privacy that occurred here is eloquently described by Judge Andrews, as quoted in *State v. Kerwick*, 512 So.2d 347 (Fla. 4th DCA 1987), when he confronted the same Broward County Sheriff's policy in dispute in this case:

> "[T]he evidence in this cause has evoked images of other days, under other flags, when no man traveled his nation's roads or railways without fear of unwarranted interruption, by individuals who held temporary power in the Government. The spectre of American citizens being asked, by badge-wielding police, for identification, travel papers — in short a *raison d'etre* — is foreign to any fair reading of the Constitution, and its guarantee of human liberties. This is not Hitler's Berlin, nor Stalin's Moscow, nor is it white supremacist South Africa. Yet in Broward County, Florida, these police officers approach every person on board buses and trains ('that time permits') and check identification, tickets, ask to search luggage — all in the name of 'voluntary cooperation' with law enforcement — to the shocking extent that just one officer, Damiano, admitted that during the previous nine months, he, himself, had searched *in excess* of three thousand bags! In the Court's opinion, the founders of the Republic would be thunderstruck."

Id. at 348-49 (quoting Judge Andrews, emphasis in original).

We agree. The intrusion upon privacy rights caused by the Broward County policy is too great for a democracy to sustain. Without doubt the inherently transient nature of drug courier activity presents difficult law enforcement problems. Roving patrols, random sweeps, and arbitrary searches or seizures would go far to eliminate such crime in this state. Nazi Germany, Soviet Russia, and Communist Cuba have demonstrated all too tellingly the effectiveness of such methods. Yet we are not a state that subscribes to the notion that ends justify means. History demonstrates that the adoption of repressive measures, even to eliminate a clear evil, usually results only in repression more mindless and terrifying than the evil that prompted them. Means

have a disturbing tendency to become the end result. And as Judge Glickstein noted in his dissent in *Snider v. State*, 501 So.2d 609, 610 (Fla. 4th DCA 1986):

> Occasionally the price we must pay to make innocent persons secure from unreasonable search and seizure of their persons or property is to let an offender go. Those who suffered harassment from King George III's forces would say that is not a great price to pay. So would residents of the numerous totalitarian and authoritarian states of our day.

For the foregoing reasons, we answer the certified question as rephrased in the affirmative. The opinion below is quashed, and we remand for further proceedings consistent with the opinion.

It is so ordered. (EHRLICH, C.J., and SHAW and KOGAN, JJ., Concur. McDONALD, J., Dissents with an opinion in which OVERTON and GRIMES, JJ., Concur. GRIMES, J., Dissents with an opinion, in which OVERTON and McDONALD, JJ., Concur)

(McDONALD, J., dissenting) One cannot complain of a search if he voluntarily consents to it. The majority, among other things, concludes that the consent given here is the result of coercion per se under the circumstances. I reject that view and conclude that whether there is a free and voluntary consent is a question of fact to be decided by the trial judge.

I totally disagree that there had been a seizure of Bostick and the logic of holding him to be seized completely escapes me.

To many the practice of police boarding a bus seeking evidence of transportation of drugs is distasteful. I can accept that, but find nothing illegal about it so long as there were no overt acts of threat or intimidation in the procurement of a consent to search. The entire war on drugs is distasteful and society should accept some minimal inconvenience and minimal incursion on their rights of privacy in that fight.

I would affirm Bostick's conviction. I would approve the decision of *State v. Avery*, 534 So.2d 182 (Fla. 4th DCA 1988). (OVERTON and GRIMES, JJ., Concur.)

(GRIMES, J., dissenting.) I admit to a certain amount of discomfort in the prospect of the police routinely boarding stopped buses to inquire of the passengers whether they will consent to a search of their luggage. However, I know of no legal principle which would justify this Court in declaring the practice to be per se illegal.

The police are at liberty to approach an individual in a public place to ask him questions if the person is willing to listen. *Florida v. Royer*, 460 U.S. 491 (1983). Such an encounter only becomes a seizure if the person is detained without reasonable objective grounds for doing so. *United States v. Mendenhall*, 446 U.S. 544 (1980). The majority's suggestion that Bostick could not have felt free to leave and that in any event there was no place to go except to get off the bus is misplaced. On the facts of this case, the controlling question is whether a reasonable person would have felt free to terminate the encounter, given the totality of the circumstances. *Id.* The United States Supreme Court has said that there is no "litmus paper test" to be applied in distinguishing an encounter from a seizure. Royer.

In *Immigration & Naturalization Service v. Delgado*, 466 U.S. 210 (1984), the Supreme Court held that the Immigra-

tion and Naturalization Service had neither detained nor seized employees who were questioned during "factory surveys" seeking to locate illegal aliens, even though the exits were "guarded" by some agents, while other agents, armed and with walkie talkies, dispersed systematically throughout the factories to question employees. Any employees giving unsatisfactory responses to the agents' questions were then asked to produce immigration papers voluntarily. The Court stated that "[o]nly when the officer, by means of physical force or show of authority, has restrained the liberty of a citizen may we conclude that a "seizure" has occurred.'" *Id.* at 215 (quoting *Terry v. Ohio,* 392 U.S. 1, 19 n.16 (1968)).

The position I take is similar to that expressed by six of the nine judges of the Fourth District Court of Appeal in the en banc decision of *State v. Avery,* 531 So.2d 182, 185-86 (Fla. 4th DCA 1988):

> Law enforcement officers are not restricted from boarding buses or other public transportation with the permission of the operator. Being lawfully present, they are free to communicate with the passengers. The location where an encounter takes place — whether on a bus, in a terminal, or in a room — is certainly a factor that the trial court should consider in weighing a motion to suppress. *See I.N.S. v. Delgado; Florida v. Royer; United States v. Mendenhall.* But the determination of whether there has been a seizure, or merely an encounter which a reasonable person would feel free to terminate, remains a question of fact to be determined from the totality of the circumstances.

Whether there has been a voluntary consent is a question to be determined from the totality of the circumstances.

Royer; Mendenhall; Schneckloth v. Bustamonte, 412 U.S. 218 (1973). The extent to which a passenger may be intimidated by the police boarding a bus and seeking permission to check his luggage properly bears on whether the consent to search has been voluntarily given. But the ultimate question of whether the consent was voluntary is a question of fact. In this case the trial judge found that the consent to search had been voluntarily given.

I respectfully dissent. (OVERTON and McDONALD, JJ., Concur.)

IN THE

Supreme Court f Florida

TERRANCE BOSTICK,

Petitioner,

vs. Case No. 70,996

STATE OF FLORIDA,

Respondent.

MOTION FOR REHEARING

Respondent, State of Florida, by and through undersigned counsel, moves this Honorable Court for rehearing and clarification pursuant to Rule 9.311, Fla.R.App.P.[1]

It is respectfully submitted that the Court has misapprehended and misapplied the Fourth Amendment provisions concerning search and seizure as definitively interpreted by controlling United States Supreme Court decisions. Although the Court's opinion does not acknowledge the relationship, article I, section 12 of the Florida Constitution, by its terms, is congruent with the Fourth Amendment, as interpreted by the United States Supreme Court.

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1 As a matter of background, it must be recalled that *Bostick* was one of six cases certified to be of great public importance by the Fourth District Court of Appeal *en banc*. These cases arose out of three different law enforcement jurisdictions and involved facts unique to each case. We urge reconsideration of each case on its merits.

Three preliminary points deserve clarification. First, the certified question of great public importance, on which this Court's jurisdiction is based, asked:

> May the police without articulable suspicion board a bus and ask at random for, and receive, consent to search a passenger's luggage where they advise the passenger that he has the right to refuse consent to search?

It is this question which the parties briefed. For reasons which are not given, and which are not readily apparent, this Court rephrased the question as follows and answered the rephrased question in the affirmative.

> Does an impermissible seizure result when police mount a drug search on buses during scheduled stops and question boarded passengers without articulable reasons for doing so, thereby obtaining consent to search the passengers' luggage?

For purposes of clarity, the state asks that the purpose of the rephrasing be stated. Was the original question too broad? Is the affirmative answer to the rephrased question also applicable to the original question, which the parties briefed and on which this Court's jurisdiction is based? The state suggests that the original question accurately, succinctly, and neutrally states the precise question presented by these cases. With all respect, the state suggests that the rephrased question demands an affirmative answer. The state agrees that an impermissible seizure results when police mount a search without articulable reasons.

Second, it is a common practice for legal advocates to present a court with a parade of horribles when urging a court to rule in their favor. It is not unusual, assuming the parade of horribles is credible, for a court to rely on that parade of horribles in its decision. Nevertheless, the state

strongly suggests that this Court's acceptance, endorsement and statement of an analogy between the depraved barbarisms of Nazi Germany, Soviet Russia, Communist Cuba and Florida policemen attempting to combat drug trafficking by requesting citizen consent to search luggage is totally unsupported by the records here. While there may be overfevered persons or groups who believe there is a Nazi or Communist under every bed and that anyone who disagrees with their point of view fits into one of the categories, the state suggests that such hyperbole has no place in a reasoned discourse of a constitutional rule of law in a court of law in these United States. The analogy totally lacks credibility and demeans the millions of victims of the depraved barbarism of Nazism and communism, the police themselves, and citizens who support the efforts of the police. Moreover, such grossly unfair and incredible arguments contribute nothing, other than emotional atmospherics, to the constitutional question presented by these cases. Unfortunately, the analogy has already been spread on the public record but the state suggests it is inappropriate to further spread it on in the record and to permanently memorialize it in the pages of the Southern Reporter. Accordingly, the state requests that the Court clarify its view by rejecting the analogy.

Third, respondent seeks clarification of the following portion of the Court's opinion:

> Thus, although the judge's finding of fact normally comes to this court with a presumption of correctness, the presumption must fail in this instance. (Slip opinion, p. 9).

Respondent respectfully submits that this Court has overlooked *McNamara v. State,* 357 So.2d 410 (Fla. 1978), in reaching this conclusion. As Justice Anstead noted in his dissent to *Avery,* 531 So.2d at 195-99:

> Initially, I disagree simply because the majority failed to honor the fundamental rule of appellate review that reviewing courts must interpret the evidence and reasonable inferences therefrom in a manner most favorable to sustain the trial court's ruling. *McNamara v. State,* 357 So.2d 410 (Fla. 1978). In contrast to the evaluation of the evidence and conclusion reached by the trial judge, the majority opinion evaluates the evidence and makes a factual finding that the alleged consent obtained by the police after boarding a bus and confronting appellant was not coerced. In essence the majority substituted its own view of the evidence for that of the trial judge. Hence in the guise of criticizing the trial court's alleged adoption of a bright line rule concerning such searches, the majority has itself adopted a bright line rule approving as a matter of law all such bus searches.

Judge Anstead's scholarly analysis applies with equal force to the majority's opinion in this case.[2] We urge clarification of the impact of this decision on *McNamara* because like Judge Anstead, respondent views this as a *fundamental* concern which is as critical to the successful functioning of an appellate court system as the majority thinks its limits on police activity are critical to the functioning of democracy.

Turning to the primary point, it is respectfully submitted that the Court has misapprehended the sharp constitutional distinction between a police officer's investigatory stop or arrest of a person and an approach to a citizen for voluntary assistance. As Professor LaFave states in his

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2 And equally to Judge Mount's ruling at the trial level in *Avery. Id.* at 531 So.2d 187 (Headnote four).

treatise[3] on search and seizure:

> Thus, if the ultimate issue is perceived as being whether the suspect "would feel free to walk away" then virtually all police-citizen encounters must in fact be deemed to involve a Fourth Amendment seizure. The *Mendenhall-Royer* standard should not be given such a literal reading as to produce such a result. (Footnote omitted).

LaFave's view is similar to that of Judge Phillip Hubbart of the Third District Court of Appeal, a Fourth Amendment expert in his own right. Discussing a pre-*Royer* airport encounter, Hubbart surmised:

> It is true that a reasonable person, innocent of any crime, might have felt, out of a sense of politeness and civic duty, that he ought to cooperate with the officer and agree to the officer's request which, in fact, the defendant did. That is a far cry, however, from concluding, as the defendant urges, that he had no choice in the matter and was compelled to stop and answer questions whether he liked it or not. We cannot so conclude as, in our view, such common social amenities and pressures do not and cannot in themselves amount to an official restraint on personal liberty. (Citation omitted).

Justice Adkins noted in *Lightbourne v. State*, 438 So.2d 380 (Fla. 1983), that the critical focus should be on whether ". . . the average reasonable person, under similar circumstances would not find the officer's actions *unduly harsh*." *Id.* at 387-388. (Emphasis added).

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3 *Search and Seizure, A Treatise on the Fourth Amendment*, Second Edition, Section 9.2(H), page 411.

Contrary to these views, this Court now bans police officers from talking to citizens who are boarding buses, airplanes, or trains and prohibits any police-citizen encounter in a narrow alleyway, crowded theater, or other small space as a matter of law. Clarification is necessary because such a ruling is directly contrary with *State v. Christie*, 385 So.2d 181 (N.C. Ct. Appeals, November 7, 1989)(copy attached), and *United States v. Whitehead*, 849 F.2d 849 (4th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 534, 102 L.Ed.2d 566 (1988), cited therein; and *United States v. Sokolow*, 490 U.S. ___, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989)("the reasonableness of an officer's decision . . . does not turn on the availability of less intrusive investigatory techniques.") and cannot withstand federal scrutiny.

Despite lip service to *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497, *reh'g denied*, 448 U.S. 908, 100 S.Ct. 3051, 65 L.Ed.2d 1138 (1980), and its standard of fact-based review, the Court has announced a brightline prohibition against all police conduct in certain areas. Although the Court has cited Judge Letts' dissenting opinion in the instant case, it has apparently overlooked his later special concurrence in *State v. Avery*, 534 So.2d 182 (Fla. 4th DCA 1988), wherein he states:

> As was noted in the dissent in *Bostick* quoting *Royer*, there is no litmus test to distinguish between a consensual encounter and a seizure. Likewise in *Mendenhall*, it is clear that whether it is a consensual encounter or a seizure requires consideration of the individual facts and circumstances of each incident. It would appear, therefore, that we cannot adopt a per se rule, unless we are to make a distinction between the quality of freedom to leave in a bus station vis-a-vis a bus.

> I am also concerned about the several courts' dogged persistence that the result is dictated by freedom to leave. Clearly that is what has been said, but I fancy that freedom to terminate the interview will prove to be a better test. One about to embark, or continue on a journey is not in my view reasonably free to leave and abandon the journey.

Id. at 531 So.2d 188. Yet, this Court's majority narrows that rule today. In doing so, it apparently overlooks what the United States Supreme Court, in another search and seizure case, has described as "'[t]he most basic function of any government . . . to provide for the security of the individual and of his property.' *Miranda v. Arizona*, 384 U.S. 436, 539 (1966)(White, J., dissenting." *Illinois v. Gates*, 462 U.S. 213, 237 (1983). There is no constitutional prohibition against police appearing on public transportation facilities and requesting consent of citizens to search their luggage. Whether in a given case the police coerce the consent is a fact-bound question which cannot be answered except by examination of the peculiar facts of the particular case. In ruling as a matter of law that the police may not request consent, the court has misapprehended and misapplied controlling case law from the United States Supreme Court.

Respectfully submitted,

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_____/s/_____

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_____/s/_____

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Supreme Court of Florida

Monday, January 29, 1990

TERRANCE BOSTICK,

Petitioner, Case No. 70,996

vs. District Court of Appeal
4th District

STATE OF FLORIDA, No. 4-86-2409

Respondent.

Respondent's Motion for Rehearing filed in the above cause is hereby denied.

EHRLICH, C.J., SHAW, BARKETT and KOGAN, JJ., Concur. OVERTON, McDONALD, and GRIMES, JJ., dissent.

_____/s/_____
SID J. WHITE
Clerk, Supreme Court

APPENDIX B

Terrance BOSTICK, Appellant,

V.

STATE of Florida, Appellee.

No. 4-86-2409

District Court of Appeal of Florida
Fourth District.

April 8, 1987.

On Motion for Rehearing July 22, 1987.

PER CURIAM.

AFFIRMED.

LETTS, WALDEN and STONE, JJ., concur.

ON PETITION FOR REHEARING

PER CURIAM

The Petition for Rehearing is denied on the authority of *Rodriguez v. State*, 494 So.2d 496 (Fla. 4th DCA 1986) and *Elsleger v. State*, 503 So.2d 1367 (Fla. 4th DCA 1987). Notwithstanding this affirmance, we deem the cause now before us to be of great public importance and we certify the following question to the Supreme Court:

MAY THE POLICE WITHOUT ARTICULABLE SUSPICION BOARD A BUS AND ASK AT RANDOM, FOR, AND RECEIVE, CONSENT TO

SEARCH A PASSENGER'S LUGGAGE WHERE THEY ADVISE THE PASSENGER THAT HE HAS THE RIGHT TO REFUSE CONSENT TO SEARCH?

WALDEN and STONE, JJ., concur.

LETTS, J., concurs in part and dissents in part.

LETTS, J., dissenting in part:

I concur in the decision to certify the question. I otherwise dissent.

This appeal evolves from police activity on a bus in the form of a random request for consent to search a passenger's luggage without articulable suspicion. The trial judge, though he orally expressed reservations, denied, without comment, the motion to suppress the evidence of contraband discovered in the luggage. Inherently, the trial judge's order was tantamount to a holding that a consensual police encounter took place rather than an illegal intrusion equivalent to a seizure. I dissent.

Two police officers, complete with badges, insignia[1] and one of them holding a recognizable zipper pouch, containing a pistol, boarded a bus bound from Miami to Atlanta during a stopover in Fort Lauderdale. Eyeing the passengers, the officers admittedly without articulable suspicion, picked out the defendant passenger and asked to inspect his ticket and identification. The ticket, from Miami to Atlanta, matched the defendant's identification and both were immediately returned to him as unremarkable. However, the two police officers persisted and explained their presence as narcotic agents on the lookout for illegal drugs. In pursuit of that

1 Their dress was "casual" over which they donned clearly marked "raid" jackets before entering the bus.

aim, they then requested the defendant's consent to search his luggage. Needless to say, there is conflict in the evidence about whether the defendant consented to the search of the second bag in which the contraband was found and as to whether he was informed of his right to refuse consent. However, any conflict must be resolved in favor of the state, it being a question of fact decided by the trial judge.

I am uncomfortable with a scenario such as this and I have extensively studied two United States Supreme Court opinions, cited hereafter, in search of counsel and guidance. With the utmost respect, I have some trouble reconciling these two decisions and I do not find them entirely consistent with one another. Certainly, their results are opposite. However, while I am fully conscious of, and will quote from, *United States v. Mendenhall,* 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), I am primarily persuaded by *Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), which is the most recent of the two and which I believe supports my conclusion.

Royer teaches that there is no litmus test for distinguishing between a consensual encounter and a seizure in violation of the Fourth Amendment. Accordingly, the endless variations in facts and circumstances of each case make it "unlikely that the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers...." *Id.* 103 S.Ct. at 1329. However, the circumstances of *Royer* do provide a basis for comparison with the controversy now before us.

The facts of *Royer* were:

1. The initial approach was by plainclothes policemen in an airport concourse, not on an actual plane.

2. The police displayed no weapons.

3. The defendant's ticket and I.D. did not match.

4. The defendant became noticeably nervous during the conversation.

5. The defendant was told he was suspected of transporting narcotics.

6. The defendant's ticket and I.D. were not returned to him making it clear, as the *Royer* court held, that he was not free to leave.

7. The defendant was requested to and did accompany the two policemen to a small enclosed room (described by law enforcement as "a large storage closet" equipped with a desk and two chairs.

8. His checked luggage was retrieved without his consent and brought to the small room.

9. He did not give his consent to the search when first approached ("on the spot" as defined by the Royer court), but only after being taken to the room and interrogated.

By contrast, the facts of the instant case reveal that:

1. The initial approach in Fort Lauderdale was by uniformed police on the actual bus in which the defendant was in transit from Miami to Atlanta.

2. There was display of a weapon.

3. The defendant's ticket and I.D. did match.

4. There is nothing in the record denoting nervousness on the defendant's part.

5. The defendant was not told that he was suspected of transporting narcotics.

6. The defendant's ticket and I.D. were immediately returned to him.

7. The defendant was not requested to leave the bus or to accompany the police officers anywhere.

8. No checked luggage was retrieved.

9. The defendant gave his consent to search "on the spot."

Obviously, some of the above enumerated facts in Royer favor a consensual encounter while others reflect a seizure. In the same vein, factors pro and con exist in the case at bar. Yet, it is clear that in *Royer* the overriding consideration was whether the defendant could reasonably believe he was free to leave. In deciding he was not free to do so, the *Royer* court, quoting our Third District Court of Appeal, made much of the confinement in the small room as "an almost classic definition of imprisonment" *Id.* 103 S.Ct. at 1323. The *Royer* court further cited as evidence that he was not free to leave, the failure by the police to return the defendant's ticket and their retrieval and possession of his luggage. True, in the case at bar, there was no retention of a ticket nor was any of the luggage impounded prior to the request for consent to search it. Further, there was obviously no interrogation room to which the defendant was transported. Nevertheless, as the court held in *Mendenhall,* the test for the presence of a seizure is whether "in view of all of the circumstances surrounding the incident a reasonable person would have believed he was not free to leave." *Id.* 100 S.Ct. at 1877. In helping to define circumstances which would indicate the passenger was not free to leave, *Mendenhall* cites examples, among others, such as the presence of more than one officer, the display of a weapon, and in a subsequent paragraph, the wearing of uniforms. *Id.* at 1877. All three of these examples, illustrative of seizure, are present in the instant case. Moreover, my version of common

sense tells me that a paid and ticketed passenger will not voluntarily forfeit his destination and get up and exit a bus in the middle of his journey, during a temporary stopover, while two policemen, one with a pouched gun in his hand, are standing over him in a narrow aisle asking him questions and requesting permission to search his luggage. It is not a question of whether he actually was *free* to leave, as all of us trained lawyers know he was. The test is whether a layman would reasonably be expected to believe he was free to leave under these circumstances. I conclude he was not.

My having decided that the defendant was not free to leave, it follows that the police questioning under the facts of this case constituted an illegal detention and a seizure. In the words of the *Royer* court, since the defendant "was being illegally detained when he consented to the search of his luggage, we agree that the consent was tainted by the illegality and was ineffective to justify the search." *Id.* 103 S.Ct. at 1329.

Nor do I find that the State has sustained its burden of establishing that any such taint was rendered harmless by a subsequent unequivocal break in the chain connecting the original seizure with the ensuing consent to search. On the contrary, the consent to search was given immediately upon the heels of the illegal detention and no measurable break in the chain took place. *See Elsleger v. State,* 503 So.2d 1367 (Fla. 4th DCA 1987), and *Brown v. Illinois,* 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975).

In conclusion, as I have already said, quoting from the United States Supreme Court on the subject, there is no available litmus test and my dissenting opinion is therefore confined to the totality of the facts and circumstances now before this court.

I WOULD REVERSE.

STATE of Florida, Appellant,

v.

Adrian Avery, Appellee.

No. 87-0270.

District Court of Appeal of Florida,
Fourth District.

Aug. 3, 1988.

Rehearing En Banc Denied
Oct. 12, 1988.

Defendant charged with possession of cocaine moved to suppress. The Circuit Court, Palm Beach County, Marvin U. Mounts, Jr., J., granted motion, and State appealed. The District Court of Appeal, Stone, J., held that public bus passenger's consent to luggage search was not "coerced," though police had boarded bus solely for purpose of randomly seeking such consent from passengers.

Reversed and remanded; question certified.

Letts, J., concurred specially and filed opinion.

Glickstein, J., concurred as to the certified question and dissented with opinion.

Anstead, J., dissented and filed opinion.

EN BANC.

STONE, Judge.

This is an appeal from an order granting a motion to suppress. Avery, a bus passenger, consented to a search by the police of his luggage, which was found to contain cocaine.

The trial court determined that the consent was coerced. Its order provided:

> Officer Chris Fahey testified that he and Officer Turner, both of the West Palm Beach Police Department comprised a unit which checked the Trailways Bus Station looking for people who might be acting as couriers for drugs northbound. They along with a dog trained to sniff for drugs would visit the bus station on a random basis for the purpose of checking northbound buses.
>
> On July 26, 1986 at approximately 8:10 p.m., they boarded a bus stopped in West Palm Beach bound for Dallas. They were not in uniform but their badges were prominently displayed and they wore windbreakers which designated the department.
>
> They proceeded to the rear of the bus and began interviewing passengers in an effort to gain their consent to search their luggage.
>
> Officer Turner's attention was drawn to Mr. AVERY because he appeared nervous and used his feet to push his tote bag under the seat. It is noted that Mr. AVERY is a large man. As a result of Mr. AVERY's actions, he was subjected to the officer's questioning.
>
> Officer Turner testified that he obtained the oral consent of Mr. AVERY to look through his baggage that was underneath his seat. The officers were aware that their Department had a written consent to search form but they didn't feel it was necessary to use such a form because it would take too much time and they couldn't do it for all passengers on board or something to that

> effect. Further testimony indicated that a consent form might be executed once a search had been completed and the suspect under arrest.
>
> The prospect of being a seated passenger on a commercial public transportation vehicle and seeing police officers come on board with their badges prominently displayed checking each passenger is an intimidating and coercive situation in and of itself.
>
> I find that if consent was given in this case it was coerced by the situation I have just described. Furthermore, I find that the Defendant's actions did not give rise to a founded suspicion which would justify his detention. *Ingram v. State,* 364 So.2d 821 (Fla. 5th [4th] DCA 1978); *Robinson v. State,* 388 So.2d 286 (Fla. 1st DCA 1980); *Horvitz v. State,* 433 So.2d 545 (Fla. 4th DCA 1983); *Gorney v. State,* 409 So.2d 220 (Fla. 4th DCA 1982).

This opinion is entered en banc because we consider the issue to be of exceptional importance.[1] We conclude that the trial court erred in determining that the defendant's consent was coerced, and reverse.

Whether consent is voluntary is a question to be determined from the totality of the circumstances. *See Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *United States v. Mendenhall,* 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497, *reh'g denied,* 448 U.S. 908, 100 S.Ct. 3051,

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1 This appeal may also appropriately be considered en banc is order to maintain uniformity in this court's decisions to the extent that any language in *Hunter v. State,* 518 So.2d 304 (Fla. 4th DCA 1987), and *Alvarez v. State,* 515 So.2d 286 (Fla. 4th DCA 1987), may be inconsistent with this opinion.

65 L.Ed.2d 1138 (1980); *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *Denehy v. State,* 400 So.2d 1216 (Fla.1980).

In determining whether evidence may be excluded because it was obtained in the course of a warrantless search and seizure, we are obligated to follow the opinions of the Supreme Court of the United States. Art. I, § 12, Fla. Const.

In *Florida v. Royer,* 460 U.S. 491, 497-98, 103 S.Ct. 1319, 1324, 75 L.Ed.2d 229 (1983), the Supreme Court discussed the concept of an encounter between an officer and an individual:

> [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. *See Dunaway v. New York, supra,* 442 U.S., at 210, n.12, 99 S.Ct., at 2255, n. 12; *Terry v. Ohio,* 392 U.S., at 31, 32-33, 88 S.Ct., at 1885-1886 (Harlan, J., concurring); *id.,* at 34, 88 S.Ct., at 1886 (WHITE, J., concurring). Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. *United States v. Mendenhall,* 446 U.S. 544, 555, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980)(opinion of Stewart, J.). The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. *Terry v. Ohio,* 392 U.S. at 32-33, 88 S.Ct., at 1885-1886 (Harlan, J., concurring); *id.,* at 34, 88 S.Ct., at 1886 (WHITE, J., concurring). He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish these grounds. *United States v. Mendenhall, supra,* 446 U.S., at 556, 100 S.Ct., at 1878 (opinion of Stewart, J.). If there is no detention — no seizure within the meaning of the Fourth Amendment — then no constitutional rights have been infringed.

In this case, the defendant had not been "stopped" or "seized" as those terms are commonly understood. Nevertheless, if his consent to the search was "coerced," a motion to suppress should be granted, and the wrongfully obtained evidence excluded. *Schneckloth v. Bustamonte.*

Clearly, such evidence would not be suppressed if Avery had been similarly approached by these officers in an area of the bus station or platform rather than on the bus itself. *See, e.g., Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *United States v. Mendenhall,* 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497, *reh'g granted,* 448 U.S. 908, 100 S.Ct. 3051, 65 L.Ed.2d 1138 (1980); *Rosa v. State,* 508 So.2d 546 (Fla. 3d DCA), *reh'g denied,* 515 So.2d 230 (Fla. 1987); *Elsleger v. State,* 503 So.2d 1367 (Fla. 4th DCA), *dismissed,* 511 So.2d 298 (Fla. 1987); *State v. Champion,* 383 So.2d 984 (Fla. 4th DCA 1980).

The state contends that Avery's consent was given in the course of an "encounter." *See Florida v. Royer; United States v. Mendenhall; Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). It is undisputed that there is no "litmus paper test" to be applied in distinguishing an "encounter" from a "seizure." *Florida v. Royer,* 460 U.S. at 506, 103 S.Ct. at 1329. The test is whether a reasonable person would feel free to terminate the encounter, given the totality of the

circumstances. *Mendenhall,* 446 U.S. at 557, 100 S.Ct. at 1879; *Schneckloth,* 412 U.S. at 227, 93 S.Ct. at 2048. In *I.N.S. v. Delgado,* 466 U.S. 210, 216-217, 104 S.Ct. 1758, 1762-63, 80 L.Ed.2d 247 (1984), the Supreme Court explained:

> Although we have yet to rule directly on whether mere questioning of an individual by a police official, without more, can amount to a seizure under the Fourth Amendment, our recent decision in *Royer, supra,* plainly implies that interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure. In *Royer,* when Drug Enforcement Administration agents found that the respondent matched a drug courier profile, the agents approached the defendant and asked him for his airplane ticket and driver's license, which the agents then examined. A majority of the Court believed that the request and examination of the documents were "permissible in themselves." *Id.,* at 501, 103 S.Ct., at 1326 (plurality opinion), see *id.,* at 523, n. 3, 103 S.Ct., at 1337-1338, n. 3 (opinion of REHNQUIST, J.). In contrast, a much different situation prevailed in *Brown v. Texas,* 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979), when two policemen physically detained the defendant to determine his identity, after the defendant refused the officer's request to identify himself. The Court held that absent some reasonable suspicion of misconduct, the detention of the defendant to determine his identity violated the defendant's Fourth Amendment right to be free from an unreasonable seizure. *Id.* at 52, 99 S.Ct. at 2641.

What is apparent from *Royer* and *Brown* is that police questioning, by itself, is unlikely to result in a Fourth Amendment violation. While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response. Cf. *Schneckloth v. Bustamonte,* 412 U.S. 218, 231-34, 93 S.Ct. 2041, 2049-51, 36 L.Ed.2d 854 (1973). Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment. But if the persons [sic] refuses to answer and the police take additional steps — such as those in *Brown* — to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure. *United States v. Mendenhall,* 446 U.S., at 554, 100 S.Ct., at 1877; see *Terry v. Ohio,* 392 U.S., at 21, 88 S.Ct., at 1879.

Law enforcement officers are not restricted from boarding buses or other public transportation with the permission of the operator. Being lawfully present, they are free to communicate with the passengers. The location where an encounter takes place — whether on a bus, in a terminal, or in a room — is certainly a factor that the trial court should consider in weighing a motion to suppress. *See I.N.S. v. Delgado; Florida v. Royer; United States v. Mendenhall.* But the determination of whether there has been a seizure or merely an encounter which a reasonable person would feel free to terminate, remains a question of fact to be determined from the totality of the cirumstances. *I.N.S. v. Delgado; Florida v. Royer; United States v. Mendenhall; Schneckloth v. Bustamonte; Jacobson v. State,* 476 So.2d

508 So.2d 546 (Fla. 3d DCA), *rev. denied*, 515 So.2d 230 (Fla.1987); *Palmer v. State*, 467 So.2d 1063 (Fla. 3d DCA 1985); *State v. Grant*, 392 So.2d 1362 (Fla. 4th DCA), *rev. denied*, 402 So.2d 610 (Fla. 1981).

A person's consent to a search is not per se involuntary because obtained by law enforcement officers on board a commercial carrier such as a bus or other similar forms of transportation. *State v. Schwartzbach*, 513 So.2d 756 (Fla. 4th DCA 1987). Generally, physical surroundings alone, or even the fact that a defendant has been taken into custody, is not sufficient to constitute coercion and vitiate consent. *Cf. I.N.S. v. Delgado; United States v. Watkson*, 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598, *reh'g denied*, 424 U.S. 979, 96 S.Ct. 1488, 47 L.Ed.2d 750 (1976). In *Watson*, the defendant had been arrested immediately before consenting to a search of his car. The Supreme Court reversed a decision of the Court of Appeals which had directed that the evidence be suppressed because the defendant's prior arrest was, by itself, coercive, and because of a lack of proof that defendant knew he could withhold his consent to the search. The Supreme Court emphasized the applicability of the *Schneckloth* requirement that the defendant demonstrate that his consent to search "was not his own 'essentially free and unconstrained choice' because his 'will ha[d] been overborne and his capacity for self-determination critically impaired.' *Schneckloth v. Bustamonte*, 412 U.S. 218, 225, 93

S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973)" *Watson*, 423 U.S. at 424, 96 S.Ct. at 828.[2]

In *Delgado*, the Supreme Court held that the I.N.S. had neither detained nor seized employees who were questioned during "factory surveys" seeking to locate illegal aliens, notwithstanding that the exits were "guarded" by some agents, while other agents, armed and with walkie talkies, disbursed systematically throughout the factories to question employees. Those employees giving unsatisfactory responses to the agents' questions were then asked to voluntarily produce immigration papers. The Supreme Court noted that the Court of Appeals had followed the opinion written by Justice Stewart in *Mendenhall* in concluding that a reasonable worker would have believed that he was not free to leave. The court, following *Royer* and *Mendenhall*, determined that there was no basis for distinguishing the questioning that occurred at the guarded exits from that which occurred inside the factory. It concluded that there had been no seizures, and that these surveys were permissible encounters, despite a psychological environment in which the alien worker might be thought to be afraid that he or she was not free to leave. The majority opinion noted that the Supreme Court has been cautious in

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2 The dissent inquires whether the majority perceives no difference between consent given before and after boarding. There is obviously a factual difference which the trial court may consider in weighing the totality of the circumstances. The issue before this court is not whether the judges individually approve of the procedure in question, but whether it constitutes per se, coercion. A passenger on a crowded bus is not, as a matter of law, necessarily more threatened, or less free to say anything, or nothing, to the officer, than is the same individual, alone, on a station platform, in a hallway, in a room, or on a country road. For example, in *Rodriguez v. State*, 519 So.2d 1079 (Fla. 1st DCA 1988), the denial of a motion to suppress was affirmed where, after a highway traffic stop, an officer, on mere suspicion, sought and received valid consent to search the trunk.

defining the limits imposed by the Fourth Amendment, "given the diversity" of potential encounters between officers and citizens. The opinion reiterated the standard adopted in *Terry v. Ohio*, that "[o]nly when the officer, by means of physical force or show of authority, has restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."

We note that even the random stopping of motor vehicles at roadblocks without cause has been found to pass constitutional muster when the detention procedure is designed to meet minimum standards. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976); *State v. Jones*, 483 So.2d 433 (Fla. 1986).

We recognize that the ruling of the trial court on a motion to suppress comes to the appellate court with a presumption of correctness. *McNamara v. State*, 357 So.2d 410 (Fla.1978). However, that burden is overcome in this case by the showing that there was no evidence of misconduct. *See State v. Champion*, 383 So.2d 984 (Fla. 4th DCA 1980). *See also State v. Grant*, 392 So.2d 1362 (Fla. 4th DCA), *rev. denied*, 402 So.2d 610 (Fla.1981).

The order granting the motion to suppress in this case was not a resolution of the facts based upon a consideration of the totality of the circumstances. Rather, it is worded as a determination of law that consent to a luggage search by a passenger in a vehicle used for public transportation is "coerced" where the police board the vehicle solely for the purpose of randomly seeking such consent from the passengers.

Ordinarily, where there is no antecedent police misconduct, a consent to search need only be shown by a preponderance of the evidence. *See generally Denehy v. State*, 400 So.2d 1216 (Fla.1980); *Alvarez v. State*, 515 So.2d 286 (Fla. 4th DCA 1987); *Elsleger v. State*, 503 So.2d 1367 (Fla. 4th

DCA 1986); *dismissed*, 511 So.2d 298 (Fla.1987); *State v. Blan*, 489 So.2d 865 (Fla. 1st DCA 19986); *State v. Fuksman*, 468 So.2d 1067 (Fla. 3d DCA 1985). *See also Rodriguez v. State*, 519 So.2d 1079 (Fla. 1st DCA 1988); *Acosta v. State*, 519 So.2d 658, 661 n. 2 (Fla. 1st DCA 1988). However, the issue in this case is not what standard of proof to apply in determining the voluntariness of the consent to search, but whether the consent is the result of coercion per se under these circumstances.

The suppression of this otherwise admissible proof is not the result of any act of misconduct or improper communication by the authorities. The officers boarded the bus at the terminal. Their attention was drawn to Avery. They advised him of their purpose in questioning and seeking the cooperation of the passengers. They asked him if he would consent to the search of his luggage, and advised him that he could refuse. The defendant was not stopped, restrained nor otherwise detained. There were no weapons involved, and no inappropriate nor intimidating conduct or language was used. The defendant was not asked to move, nor was he physically prevented from moving. His ticket and license were not confiscated.

It is not argued that the trial court's decision was based on weighing credibility. The trial court did not dispute the state's evidence. The suppression was not based on the officer's failure to impart any warning or furnish any information to the defendant. The order assumes that Avery consented to the search and focuses on the "coercion" which the court deemed inherent in such a situation.

This court has previously affirmed orders denying motions to suppress evidence uncovered in a search conducted with the consent of bus passengers. *See Hunter v. State* 518 So.2d 304 (Fla. 4th DCA 1987); *Bostick v. State*, 510 So.2d 321 (Fla. 4th DCA 1987); *Snider v. State*, 501 So.2d 609 (Fla.

4th DCA 1986); *Rodriguez v. State,* 494 So.2d 496 (Fla. 4th DCA 1986). One need not be unsympathetic to the concerns of the experienced trial judge, or to those expressed by judges of this court in the concurring or dissenting opinions in *Bostick, Snider,* and *Hunter,* as well as those similarly expressed in *State v. Schwartzbach,* 513 So.2d 756 (Fla. 4th DCA 1987), *Alvarez v. State,* 515 So.2d 286 (Fla. 4th DCA 1987), and *State v. Carroll,* 510 So.2d 1133 (Fla. 4th DCA 1987), to recognize that trial courts should not apply a bright line standard in determining whether consent was coerced. *Cf. State v. Schwartzbach.*

We certify the following question to the supreme court as one of great public importance:

> MAY EVIDENCE, OBTAINED AS A RESULT OF DEFENDANT'S CONSENT TO SEARCH, BE SUPPRESSED BY THE TRIAL COURT AS "COERCED" UPON THE SOLE GROUND THAT THE OFFICER(S) BOARDED A BUS (OR OTHER PUBLIC TRANSPORT) AND RANDOMLY SOUGHT CONSENT FROM PASSENGERS?

We therefore reverse and remand for further proceedings.

HERSEY, C.J., and DOWNEY, DELL, WALDEN and GUNTHER, JJ., concur.

LETTS, J., concurs specially with opinion.

GLICKSTEIN, J., concurs with certified question and dissents with opinion.

ANSTEAD, J., dissents with opinion.

LETTS, Judge, concurring specially.

Judge Glickstein's call for a per se rule outlawing requests for consent to search in situations where there are no

articulable suspicions is beguiling, but at our level I doubt we are free to adopt it. As was noted in the dissent in *Bostick* quoting *Royer,* there is no litmus test to distinguish between a consensual encounter and a seizure. Likewise in *Mendenhall,* it is clear that whether it is a consensual encounter or a seizure requires consideration of the individual facts and circumstances of each incident. It would appear, therefore, that we cannot adopt a per se rule, unless we are to make a distinction between the quality of freedom to leave in a bus station vis-a-vis a bus seat.

I am also concerned about the several courts' dogged persistence that the result is dictated by freedom to leave. Clearly that is what has been said, but I fancy that freedom to terminate the interview would prove to be a better test. One about to embark, or continue, on a journey is not in my view reasonably free to leave and abandon the journey.

In the case at bar, had the trial judge concluded that the search was coercive under all the facts and circumstances, I would vote for affirmance. He did not do that, however, and instead adopted a per se coercive rule. While I have leanings in favor of such a rule, I believe he exceeded his prerogative under the case law.

Finally, my misgivings about this particular case are also assuaged by the fact that there may well have been an articulable suspicion present. There is unchallenged testimony that when the officers first boarded the bus, before any request to search was made, the defendant was very nervous, was "squirming" and "trying to conceal the bag under his seat."

GLICKSTEIN, Judge, concurring as to the certified question and dissenting as to the remainder.

I concur with certification of the question as one of great public importance. Otherwise, I dissent.

My thoughts on the present issue, having sprung initially during oral argument in *Snider v. State,* 501 So.2d 609 (Fla. 4th DCA 1986), were perhaps not very articulate in *State v. Carroll,* 510 So.2d 1133 (Fla. 4th DCA 1987), and *Hunter v. State,* 518 So.2d 304 (Fla. 4th DCA 1987). That is unfortunate, given the importance of the issue. Nevertheless, I now feel that only a per se rule will stop what is occurring. Without it, we shall be deciding these cases endlessly ad hoc, without any hope of uniformity. I base this conclusion on the history of "boarded passengers" cases in this court, which I list chronologically:

1. *Rodriguez v. State,* 494 So.2d 496 (Fla. 4th DCA 1986).

2. *Snider v. State, supra.*

3. *Bostick v. State* (I), the original PCA, issued April 8, 1987, but not reported in F.L.W.

4. *Hunter v. State* (I), the original opinion which was to be issued on April 22, 1987, and was pulled by Judge Anstead. It is quoted verbatim in my occurrence in *Hunter v. State* (II).

5. *Bostick v. State* (II), on rehearing, containing a certified question, 510 So.2d 321 (Fla. 4th DCA 1987).

6. *State v. Carroll, supra.*

7. *Alvarez v. State,* 515 So.2d 286 (Fla. 4th DCA 1987).

8. *State v. Schwartzbach,* 513 So.2d 756 (Fla. 4th DCA 1987).

9. *Hunter v. State* (II), *supra.*

I requested that Avery be decided en banc because I perceived the issue to be of great importance and the results to require uniformity. The majority of the judges agreed, but

the outcome of our en banc decision is the same as that of the majority on the original panel.

A specially concurring colleague doubts whether "at out level . . . we are free to adopt" a per se rule outlawing requests for consent to search absent an articulable suspicion. Unless this question has been directly addressed and decided otherwise by the United States Supreme Court or the Supreme Court of Florida, I know of no reason why this court, which for most causes coming before it is the court of last resort, may not state the law as it sees it. *Hoffman v. Jones,* 280 So.2d 431, 433-34 (Fla.1973), states merely that a district court of appeal may not overrule controlling precedent set down by the Florida Supreme Court; and we are aware of the effects of the 1982 amendment to article I, section 12 of the Florida Constitution.

Avery was the appropriate case to en banc. We now see that local police officers in South Florida are boarding interstate buses at stops in Broward and Palm Counties, knowing there is a stopover of no more than twenty and often no more than ten minutes, going to the rear of the passenger section, and proceeding to ask *every* passenger for consent to search their baggage. The so-called war on drugs may unwittingly have become a war upon a prized element of our democracy — the right to be let alone.

Judge Brandeis observed, "A judge rarely preforms his functions adequately unless the case before him is adequately presented." There appears to be little authority, however, that is factually on point. As a result, the trial judges and the judges on this court have used a variety of terms and expressions in framing and deciding the issues. In reviewing the court's records on this issue, I located authority in two *Bostick* briefs which I shared with the court at our en banc conference. One case, *United States v. Martinez-Fuerte,* 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d

1116 (1976), discussed hereinafter, found its way into the en banc majority opinion, but the critical case *United States v. Brignoni-Ponce*, 42 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975), did not.

A starting point, at least for me, is Justice Brennan's concurrence in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), which defines the elements of a legitimate "stop." I have cited it in my concurrence in *In re Forfeiture of 1984 Toyota Pickup*, 501 So.2d 610 (Fla. 4th DCA 1986).

> *[A] police officer with reasonable suspicion of criminal activity, based on articulable facts,* may detain a suspect briefly for purposes of limited questioning and, in so doing, may conduct a brief "frisk" of the suspect to protect himself from concealed weapons.

(citations omitted) (emphasis added). 501 So.2d at 611. I then quoted the following language of Justice Brennan, to which I now add emphasis:

> *Terry* encounters must be brief; the suspect must not be moved or asked to move more than a short distance; physical searches are permitted only to the extent necessary to protect the police officers involved during the encounter; *and most importantly, the suspect must be free to leave after a short time* and to decline to answer the question put to him.
>
> "[T]he person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for

> arrest, although it may alert the officer to the need for continued observation." *Id.*, at 34, 88 S.Ct., at 1886, (WHITE, J., concurring).
>
> Failure to observe these limitations converts a *Terry* encounter into the sort of detention that can be justified only by probable cause to believe that a crime has been committed. *See Florida v. Royer*, 460 U.S., at 501, 103 S.Ct., at 1326 (Opinion of WHITE, J.): *id.*, at 509-511, 103 S.Ct., at 1330 (opinion of BRENNAN, J.); *Dunaway v. New York*, 442 U.S., at 216, 99 S.Ct. at 2258.
>
> 461 U.S. at 363-65, 103 S.Ct. at 1861-62, 75 L.Ed.2d at 912-14 [Footnotes omitted].

Id. at 612.

One deduces that the majority here believes one is free to leave a bus, train, airplane, or boat after boarding. Thus, in the *Avery* scenario, someone who has boarded the bus which was traveling from Dade County to Dallas, would be "free to leave" at a Broward County terminal, whereever they boarded or whatever their destination. Does the majority perceive no constitutional difference between an individual standing in a bus or train station, airport, or marina before getting aboard a conveyance, and one who has boarded a bus — particularly one who boarded it at an earlier stop? What if the bus driver collected one's ticket, or punched it, or kept part of it and gave the passenger a stub? Do the narrow aisles of interstate buses as readily as the broad corridors of an air terminal accommodate breaking off a gratuitous police encounter? *See Mendenhall* and *Royer*. Finally, is the next step to bring a drug dog aboard each bus to sniff all the luggage?

Earlier herein, I referred to my discussion at conference of *United States v. Martinez-Fuerte*, which contains a major distinction from *United States v. Brignoni-Ponce*. The latter case quoted *Terry* for the following proposition:

> [W]henever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person.

Id. at 878, 95 S.Ct. at 2578. The court then said:

> *We are unwilling to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving patrol stops.*

(Footnote omitted)(emphasis added). *Id.* at 882, 95 S.Ct. at 2580. The court then pointed out a number of considerations which I feel have their counterparts in "boarded passenger" cases:

1. The roads near borders carry a large volume of legitimate traffic. So do buses.

2. Substantially all of the automobile traffic in large metropolitan areas is lawful. So is the travel of most bus passengers.

3. To approve roving patrol stops without suspicion that an automobile is carrying illegal immigrants would subject residents to potentially unlimited interference with highway use, solely at the discretion of Border Patrol Officers. Avery "stops" may not interdict highway use, but certainly interfere with relaxed travel by bus passengers.

4. Approval of random stops implies motorists may be questioned day or night, without any reason to suspect them. Random inquiries of bus passengers have a comparable result.

In *Martinez-Fuerte*, the court approved stops at *regular checkpoints* and acknowledged they were "seizures." It contrasted random stops, which it had earlier disapproved, because of grave danger that officers would abuse "unreviewable discretion." It took pains to point out that regular checkpoints do not take motorists by surprise. With the majority decision in *Avery*, why should not officers be able to stop automobiles at random and ask the same questions they are asking bus passengers?

Justice Brennan's dissenting concerns in *Martinez-Fuerte*, in which Justice Marshall joins, should be considered by the majority:

> Consistent with this purpose to debilitate Fourth Amendment protections, the Court's decision today virtually empties the Amendment of its reasonableness requirement by holding that law enforcement officials manning fixed checkpoint stations who make standardless seizures of persons do not violate the Amendment. This holding cannot be squared with this Court's recent decisions in *United States v. Ortiz*, 422 U.S. 891, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975); *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); and *Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973). I dissent.

Id. at 568-69, 96 S.Ct. at 3088, 49 L.Ed.2d at 1134-35. Further, he wrote:

> This defacement of Fourth Amendment protections is arrived at by a balancing process that overwhelms the individual's protection against unwarranted official intrusion by a governmental interest said to justify the search and seizure. But that method is only a convenient cover for condon-

> ing arbitrary official conduct, for the governmental interests relied on as warranting intrusion here are the same as those in *Almeida-Sanchez* and *Ortiz*, which required at least a showing of probable cause for roving-patrol and fixed checkpoint searches, and *Brignoni-Ponce* which required at least a showing of reasonable suspicion based on specific articulable facts to justify roving-patrol stops. Absent some difference in the nature of the intrusion, the same minimal requirement should be imposed for checkpoint stops.

Id. at 570, 96 S.Ct. at 3088-89, 49 L.Ed.2d at 1135.

I urge the majority to consider the concerns of Justice Douglas in his concurrence in *United States v. Brignoni-Ponce*, quoted in the writer's dissent in Ewen v. State, 518 So.2d 1285 (Fla. 4th DCA 1988).

The majority en banc opinion will now represent the law of this district. Unhappily, it is contrary to my values and those of some trial judges in this district, with whose conclusions I agree. Those orders previously before this court on the issue warrant discussion because an appellate court may take judicial note *of its own records. See, e.g., Arnold Lumber Co. v. Harris*, 503 So.2d 925 (Fla. 1st DCA 1987)(court may take judicial note of helpful context of briefs in another appeal to flesh out what the opinion in that case did not reveal). *See also Foxworth v. Wainwright*, 167 So.2d 868 (Fla.1964); *Irvin v. Chapman*, 75 So.2d 591 (Fla.1954); and *Collingsworth v. Mayo*, 37 So.2d 696 (Fla. 1948).

Circuit Judge Marvin Mounts eloquently said in *Schwartzbach* that even if appellee had given his consent, it was coerced in the following situation:

> The matter was before the Court on the Defendant's Motion to Suppress December 30,

> 1986, with Charles Burton, Assistant State Attorney representing the State and Paul Petillo, Assistant Public Defender, representing the Defendant.
>
> On August 6, 1986, the Defendant was seated in a Greyhound bus parked in the West Palm Beach bus station when she was approached by two Palm Beach County Sheriff Deputies, Deputies Terry Marvin and Dale Allen. As part of their duties with the smuggling unit of the Sheriff's Office, Marvin and Allen would board northbound buses for the purpose of obtaining passenger's consent to search their carry-on baggage.
>
> Deputy Marvin testified that he initiated the conversation with Defendant and asked her if she would consent to a search of her duffel bag. Deputy Marvin testified that he obtained oral consent; a written consent to search form was not used. Defendant was not advised she had the right to refuse consent.
>
> By stipulation of counsel, part of Deputy Allen's deposition was to be heard and considered by the court on the Motion to Suppress. Deputy Allen stated in deposition that Deputy Marvin had asked Defendant if she "minded" if he searched her bag and her answer was "yes, sure." This would make the facts of this case almost indistinguishable from those in *State v. Kassidy*, 495 So.2d 907 (Fla. 3d DCA 1986)(no consent when Defendant asked "Do you mind if I search?" Defendant answered, "yeah."); and *Robinson v. State*, 388 So.2d 286 (Fla. 1st DCA 1980)("Do you mind if I pat you down?" "Sure.").
>
> Even assuming the Defendant consented to the search that consent must be voluntary and not the

product of coercion. The prospect of being a seated passenger on a commercial public transportation vehicle and seeing police officers come on board with their badges prominently displayed checking each passenger is an intimidating and coercive situation in and of itself.

I find that even if consent was given in this case it was coerced by the situation I have just described.

The Motion to Suppress is Granted.

One can see from *Schwartzbach* and from *Avery*, also decided by Judge Mounts, with whose decision I agree, that missing in both cases is the retention of the passenger's drivers' license during the detention, as had occurred in *Carroll*.

I also agree with the similar conclusions of other trial judges, the review of whose decisions has been abated, pending our decision in *Avery*.

There are answers to questions involved in the war on drugs which do not emasculate our democracy. The majority's decision here is not one of them. Most important is the fact that judicial opinions which effectively restrict constitutional rights have a way of providing authority for decisions promulgating successively greater restrictions.

The use made here by the majority of *I.N.S. v. Delgado* is a case in point. There a federal district court had denied factor workers an injunction against Immigration and Naturalization Service (INS) "factory surveys," a Court of Appeals had reversed, and the Supreme Court reversed that reversal. The essence of the holding in *Delgado* is that the actions of INS agents who, with the employer's consent, moved systematically through a factory, asking all employees their citizenship, and asking to see the papers of aliens,

while other agents were at the exits, did not constitute seizure in terms of the Fourth Amendment. A significant factual and legal aspect of *Delgado* had to be the statutory authority of the INS to question any alien or person believed to be an alien as to his right to be or remain in the United States.

Much of the *Delgado* excerpt which the majority here quotes discusses the precedential cases by use of which the *Delgado* majority showed that officers' asking persons for identification is not per se a seizure. Yet the present majority expands *Delgado* to cover random drug interrogations, conducted by local officers, of passengers riding common carriers — not factory workers at their workplace — briefly stopped in their jurisdictions, where the question is not "Who are you?" but, "May we look in your luggage for drugs?"

The immediate issue in the spate of cases of which *Avery* is representative is identification of the limits imposed on random police investigations by the Fourth Amendment and by Florida's article I, section 12. There is also, however, the broader — arguably, ineffable — subject of contemporary societal debate: how best to contain subversion, by the rampancy of illegal drugs, of our society and of the political institutions of neighboring countries.

We read of congressional plans to increase the interdictory role of the armed services, over the objection of those who fear the consequences of departing from the tradition of keeping the military out of law enforcement in civilian society. We see proposals to legalize drugs, even to put government into the drug business, in order to take away the lucrative profits that drive the illicit market. Such proposals pose at the least a moral dilemma; but they bring up also a question whose answer is not wholly known: How does the societal price of drug abuse as such compare with the price attributable solely to the fact that we have made

drugs illegal? Analogy to the history of prohibition of alcoholic beverages is imperfect for at least two reason; first, because prohibition was largely a United States phenomenon, whereas trafficking in today's drugs of choice is prohibited in much of the world; and second, because alcohol abuse and alcoholism are not nearly so disruptive of community life as are drug abuse and drug addiction.

Some believe that an intolerable health cost would attach to the legalization of drugs. *See* Kerr, *The Unspeakable is Debated: Should Drugs be Legalized?* N.Y. Times, May 15, 1988 § 1 at 1, 12 (national ed.).

The following quotation from a letter to the editor points up one danger of legalization:

> The legalization of drugs might drive their prices down but would not deglamorize the lure of drugs. Would we then bother to provide treatment for the greater number of addicts who would be legally free to buy and use drugs? In fact, do we provide adequate treatment now for alcoholics?

Sheinbaum, Make Prevention the First Priority, N.Y. Times, May 14, 1988, at 14 (national ed.).

Verne L. Speirs, Administrator of the Justice Department's Office of Juvenile Justice and Delinquency Prevention (OJJDP) tries to put a good face on the current federal effort when he writes:

> As a result of President Reagan's leadership and the Anti-Drug Abuse Act of 1986, many Federal agencies are focusing their efforts on reducing and preventing illegal drug use by juveniles.
>
> Although the Office of Juvenile Justice and Delinquency Prevention received no additional funding from the Anti-Drug Abuse Act, the Office

> took the lead in coordinating all Federal programs dealing with illegal drug use by this country's youth.

Speirs, *OJJDP Coordinates Federal Juvenile Drug Abuse Efforts,* NIJ Reports, Mar./Apr. 1988 at 10. The key words to me are those which way that his office received no additional funding from the Anti-Drug Abuse Act.

Mere publicity about the dangers of drugs will accomplish little. As Speirs himself says, despite the efforts of parents, teachers, students and national and local leaders, 5,000 Americans daily join in the ranks of cocaine users. *Id.*

Admittedly, when the writer first wrote the following lines, he was not so prescient as to recognize the range of problems to which it might be relevant:

> It would be society's greatest reward — tangibly and otherwise — were the future adult inhabitants of his state able to look back to the 1980's and reflect how their predecessors finally came to recognize the priority to be given the well being of children. Such future citizens would undoubtedly be the beneficiaries from (1) our present awareness that children are our most precious gift and entitled to enjoy the happiness which those adults responsible for them can provide: and that they are our only priceless commodity — the key to the well-being of society; and (2) our recognition that without prioritizing the physical, emotional and educational needs of children, all the efforts to eliminate crime, poverty and ignorance are only kneejerk, bandaid solutions which cure none of society's basic ills.

Costa v. Costa, 429 So.2d 1249, 1252 (Fla. 4th DCA 1983). Is this not also a guidepost on the road to solving the drug problem?

The war on drugs will not be won by plainclothes detectives asking transient bus passengers for permission to search their luggage. Our best hope is a massive prevention program, concentrating more on building young peoples' sense of self-worth than on scare tactics.

EPILOGUE

In 1982, at the urging of a conservative activist legislator, we Floridians tied our highest state court's hands, by limiting the breadth of the search and seizure provisions of our own Constitution to the Fourth Amendment constrictions of our increasingly conservative activity highest United States court.

Edwin M. Yoder, himself a southern conservative columnist, recently quoted Oliver Wendell Holmes in commenting upon the most recent intrusion by that Court into our individual lives, by way of our garbage cans:

> "We have to chose," Holmes wrote in his *Olmstead* dissent, opposing a warrantless wiretap, "and for my part I think it is a lesser evil that some criminal should escape than that the Government should play an ignoble part."
>
> The emerging test of privacy expectations is pushing us rapidly toward a Catch-22. The search of Greenwood's garbage bags would violate Fourth Amendment rights, Justice White tells us, "only if respondents manifested a subjective expectation of privacy in their garbage that society accepts as objectively reasonable."

> The trickiness of this test is obvious. Every time the Court decides that someone' expectations of privacy are without "objectively reasonable" foundation, it shrinks the zone of privacy. And every time it shrinks the zone of privacy, it obviously shrinks what society will expect.
>
> The pitfalls of this circular judicial logic were spotted from the outset—not long after the last Justice Harlan (a friend of privacy rights, it should be noted) developed the "expectations" test. If what society expects of the police and magistrates is the test, commended Prof. Anthony Amsterdam at the time, "the Government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television . . . that we were all forthwith being placed under comprehensive surveillance."
>
> Precisely.
>
> It may be of some urgency, given the state of public hysteria, to prosecute drug peddlers. But all shortcuts that expedite police work carry a cost. If garbage bags at the curb are now open to purloining and warrantless searches, what will be next? Garbage bags in the garage? It is easy to see how, as public expectations shrink, the Court could find justification for yet-greater intrusions, each feeding on the earlier one.

The Miami Herald, May 21, 1988, 23A.

ANSTEAD, Judge, dissenting.

Although I compliment the majority's effort to provide a rationale for approving "consent" searches conducted by the

police at random on interstate buses in transit, I cannot agree with the majority's legal analysis or its application to the facts of this case.[3]

STANDARD OF REVIEW

Initially I disagree simply because the majority fails to honor the fundamental rule of appellate review that reviewing courts must interpret the evidence and reasonable inferences therefrom in a manner most favorable to sustain the trial court's ruling. *McNamara v. State,* 357 So.2d 410 (Fla.1978). In contrast to the evaluation of the evidence and conclusion reached by the trial judge, the majority opinion evaluates the evidence and makes a factual finding that the alleged consent obtained by the police after boarding a bus and confronting the appellant was not coerced. In essence the majority substitutes its own view of the evidence for that of the trial judge. Hence, in the guise of criticizing the trial court's alleged adoption of a bright-line rule concerning such searches, the majority has itself adopted a bright-line rule approving, as a matter of law, all such bus searches.

ENCOUNTER OR DETENTION

I believe the majority's legal and factual analysis is flawed. In my view the most vulnerable premise of the majority opinion is the implicit conclusion that the confrontation of Avery by the police constituted a permissive encounter rather than a detention. It is well established that if a police-citizen contact is found to be a permissive encoun-

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3 As exemplified by the opinion in *Rodriguez v. State,* 494 So.2d 496 (Fla. 4th DCA 1986), and *Bostick v. State,* 510 So.wd 321 (Fla. 4th DCA 1987), this court has decided many bus search cases without providing any rationale for its decision.

ter, the police may search the traveler's luggage with his consent notwithstanding the absence of an articulable suspicion of criminality. *Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (19830; *United States v. Mendenhall,* 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980); *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). However, the detention of a citizen violates his right to be free from unreasonable seizure "absent some reasonable suspicion of misconduct." *Brown v. Texas,* 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979). To sustain a consent search conducted during a detention, unsupported by reasonable suspicion of misconduct, the state must produce clear and convincing evidence of a voluntary consent to search free of the taint of the improper detention. *Alvarez v. State,* 515 So.2d 286 (Fla. 4th DCA 1987).

The majority essentially rules as a matter of law that being a seated passenger subjected to particularized inquiry or to a sweep by police of all passengers on a bus cannot be sufficiently intimidating as to possibly vitiate a passenger's consent to have his bags searched. The majority holds:

> The defendant was not stopped, restrained or otherwise detained. There were no weapons involved,[4] and no inappropriate nor intimidating conduct or language was used. The defendant was not asked to move, now was he physically prevented from moving.

[Majority opinion, p. 187]. In response to these conclusions, I tend to agree with the comments of Judge Letts made in his dissent in *Bostick v. State,* 510 So.2d 321, 323 (Fla. 4th DCA 1987):

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4 It should be noted that the officer testified not that there were no weapons involved, but rather that they had "no guns exposed."

Moreover, my version of common sense tells me that a paid and ticketed passenger will not voluntarily forfeit his destination and get up and exit a bus in the middle of his journey, during a temporary stopover while a policeman, one with a pouched gun in his hand, are standing over him in a narrow aisle asking him questions and requesting permission to search his luggage. It is not a question of whether he actually was free to leave, as all of us trained lawyers know he was. The test is whether a layman would reasonably be expected to believe he was free to leave under these circumstances. I conclude he would not.

My having decided that the defendant was not free to leave, it follows that the police questioning under the facts of this case constituted an illegal detention and a seizure. In the words of the *Royer* court, since the defendant "was being illegally detained when he consented to the search of his luggage, we agree that the consent was tainted by the illegality and was ineffective to justify the search." *Id.* 103 S.Ct. at 1329.

Nor do I find that the State has sustained its burden of establishing that any such taint was rendered harmless by a subsequent unequivocal break in the chain connecting the original seizure with the ensuing consent to search. On the contrary, the consent to search was given immediately upon the heels of the illegal detention and no measurable break in the chain took place. *See Elsleger v. State*, 503 So.2d 1367 (Fla. 4th DCA 1987), and *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975).

Id. at 323-34. Judge Letts' views are consistent with the result and the privacy analysis we have previously utilized in evaluating a similar search on a train. *See Alvarez v. State*, 515 So.2d 286 (Fla. 4th DCA 1987),. *See Hunter v. State*, 518 So.2d 304 (Fla. 4th DCA 1987)(trial court's denial of motion to suppress approved where there is clear and convincing proof of voluntary consent to search). I would apply the same analysis here.

THE FACTS

Although the majority concedes in a footnote that there is a factual difference between consent given before and after boarding which the trial court may consider in weighing the totality of the circumstances, its conclusion that the contact sub judice was an "encounter" ignores completely the particular circumstances presented by bus searches which would support a finding of detention rather than an encounter. These factors include:

> 1) the contrast between access to an obviously public bus terminal and the interior of an interstate bus in transit where access to the latter is restricted to passengers with tickets or others having a good reason to be on board with the authorization of the bus company;
>
> 2) the novelty of a police search of a bus in this country and the unfamiliarity of many passengers with their right to refuse consent for a search by the police without having to fear arrest or other repercussions as a consequence of that refusal;
>
> 3) the tremendous authority placed in the hands of police officers to compel obedience to their requests and the peaceful deference to that authority urged upon our citizens. When uttered by a

person in authority, a "may" often becomes a "must";

4) the implicit accusatory nature of a request by the police to search a particular passenger's luggage for illegal drugs;

5) the small area to which a seated passenger is confined and the resulting conspicuousness attendant to a passenger's attempt to publicly decline to give consent, to refuse further conversation with police or to leave a bus already filled with passengers;

6) the narrow aisles which are automatically "blocked" merely by the presence of a police officer even though the officer may not "intend" that his presence in the aisle should serve to "detain" the passengers whose bags he seeks to search;

7) the brief duration for which the bus is stopped before departure;[5]

8) the police officers' presence on board right up until the time that the bus is ready to depart, thereby making the passenger less likely to view exit and re-entry onto the bus to be a reasonable alternative.

In my view, these factors support the trial court's findings and render questionable a conclusion that a reasonable

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5 The police officers testified that they only had ten minutes to check the bus during the boarding operation.

passenger in transit would in fact have felt free to leave or to terminate the contact as would someone in the terminal.[6]

THE LAW

As noted above, the primary flaw in the legal analysis of the majority opinion is that it completely fails to address the issue of whether a reasonable person would feel free to leave under the prevailing circumstances, in spite of the fact that language is utilized as the standard in all of the recent Supreme Court cases. *I.N.S. v. Delgado,* 466 U.S. 210, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984); *Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); *United States v. Mendenhall,* 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497, *reh'g denied,* 448 U.S. 908, 100 S.Ct. 3051, 65 L.Ed.2d 1138 (1980). The majority makes several broad and conclusory statements unsupported by analysis. On page 184, is the bald statement that Avery "had not been 'stopped' or 'seized' as those terms are commonly understood." Again on page 187: "The defendant was not stopped, restrained nor otherwise detained." Yet *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), is quoted on page 9 for the principle that a seizure has occurred when the police officer, "by means of physical force *or show of authority*" has restrained the liberty of a citizen.

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6 Without a determination that the subject search was consensual pursuant to an encounter, the trial court would have to consider whether the search was permissible as one pursuant to a "detention" based on an articulable suspicion. Noteworthy on this issue is the lack of any challenge to the trial court's express statement to the effect that the facts presented here did not support a finding of "articulable suspicion." That conclusion too found support by substantial competent testimony by the police officer that all bus passengers must stow carryon bags under their seats and that is not at all unusual that a passenger would accomplish that by shoving his bags under the seat with his feet and would then rest his feet on the bag for lack of other floor space.

The majority simply ignores the issue raised by Judge Letts as to whether the conduct of two officers exhibiting the trappings of authority, standing in the narrow aisle of the bus, towering over a seated passenger, and asking for a ticket, identification and permission to search his luggage, is the "show of authority," referred to in *Terry*, or whether the average citizen would feel free to leave. Even *Mendenhall*, in which the detention was found not to be illegal, stated that the presence of more than one officer, display of weapons, and wearing of uniforms, may be circumstances which would indicate the passenger may think he was not free to leave. 446 U.S. at 554, 100 S.Ct. at 1877. Similarly, the Supreme Court in *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), states that consent can be coerced by explicit or *implicit* means, and quotes Justice Traynor in holding that whether consent is given in response to *"implied assertion of authority"* is a question of fact. 93 S.Ct. at 2044. By failing to address this issue, the majority ignores the factual circumstances of the confrontation and the trial court's resolution of the facts.[7]

The majority repeatedly cites *I.N.S. v. Delgado* and appears to rely heavily on that case. Such reliance seems to be misplaced for several reasons. In *Delgado*, the INS conducted "factory sweeps" for the purpose of looking for illegal aliens. In two "surveys," the INS acted pursuant to *warrants* issued upon a showing of probable cause that numerous illegal aliens were employed at a particular factory owned by a certain garment company. The third survey was done at another factory of the same company, with the employer's

7 Another issue ignored by the majority is the extent of the consent, if any, given to search Avery's luggage. It appears factually that any consent sought and obtained was to "look through" the luggage, not to forcibly tear open a sealed and wrapped container. *See Horvitz v. State*, 433 So.2d 545 (Fla. 4th DCA 1983); *State v. Cross*, 13 F.L.W. 270 (Fla. 3d DCA Jan. 26, 1988).

consent. The INS agents were armed, displayed badges, and had walkie-talkies. Some agents were stationed at the exits. *Delgado* was decided by a five-member court. The majority held that there was no seizure of the entire work force during the duration of the surveys, nor was the individual questioning of respondents a seizure. Justices Brennan and Marshall concurred only in the former, not the latter part of the holding. 104 S.Ct. at 1767. Thus there were only three justices concurring in the majority holding that the *individual questioning was not a seizure.* Notably, the dissenters were of the opinion that the surveys demonstrated a "show of authority" and that a reasonable person would "feel compelled" to provide answers to the agents' questions. *Id.* at 1769. That part of the holding with which *five* justices agreed — that there was no seizure of the entire work force for the duration of the surveys — would only be helpful in the instant case if the trial court had found that *all* the passengers on the *entire* bus had been seized for the duration of the officers' questioning.

Furthermore, two of the surveys involved in *Delgado* were conducted pursuant to warrants issued on probable cause, and the third was conducted at another factory operated by the same company. In other words, the surveys were conducted with judicial authorization based on reasonable belief that illegal aliens were employed at those *particular* factories. Although it may be unwise to hang one's hat onto his distinction (as the warrants did not identify any particular illegal aliens by name and the surveys affected all workers, including the legal ones), at least the INS agents — unlike the officers in the case at bar — were not merely guessing that they would uncover illegal activity. The officers in *Avery* even lacked knowledge that any particular bus would be transporting an individual(s) engaged in illegal activity. If that were the case, *Delgado* would be more closely analogous to this case.

The majority's injection into its opinion of one of the United States Supreme Court cases involving Border Patrol/motor vehicle stops, and then addressing it only cursorily, is also disconcerting. *United States v. Martinez-Fuerte,* 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976), and *State v. Jones,* 483 So.2d 433 (Fla.1986) are cited on page 10, preceded by the statement that "random stopping of motor vehicles at roadblocks without cause" passes constitutional muster. A careful reading of *Martinez-Fuerte* does not lead to the same broad conclusions as that reached by the majority. *Martinez-Fuerte* involves *permanent* roadblocks at a border patrol checkpoint near the Mexican border. Since all cars are stopped at the checkpoints, the stops are not "random." The purpose of such checkpoints is to visually inspect for possible illegal aliens coming over the border. The Court approved such stops, even without articulable suspicion as to any particular case, because they are permanent and fixed and *known* to motorists *in advance,* and the concern or fright to travelers is minimal because other vehicles are also being stopped. Significantly, in another Border Patrol/motor vehicle stop case, the Court held that *roving* patrols may only stop vehicles if there are "specific articulable facts . . . that reasonably warrant suspicion" that the *particular* vehicle contains illegal aliens. *United States v. Brignoni-Ponce,* 422 U.S. 873, 884, 95 S.Ct. 2574, 2582, 45 L.Ed.2d 607 (1975). The Court notes that legitimate motorists may be frightened if stopped at random by a roving patrol, and that such limited discretion in the police may be abused and cannot be allowed. *Id; Martinez-Fuerte.* Thus, the Supreme Court has differentiated between fixed, permanent stops known in advance which do not catch any motorist by surprise and which do not require articulable suspicion, versus random stops by roving patrols which do surprise and may frighten motorists and *do* require articulable suspicion. The situation in the case at bar seems obviously more analogous to the latter case, and

would therefore seem to require articulable suspicion. Furthermore, the Florida Supreme Court held in *State v. Jones,* that law enforcement officials must issue written uniform guidelines which *minimize the discretion* of field officers before conducting DUI roadblocks; that there must be *sufficient warning* in advance of the stop; and that vehicles could not be stopped "selectively," 483 So.2d at 438, such as by roving patrols. Thus the majority's reference to *Martinez-Fuerte* and *State v. Jones* seems inappropriate, since both cases — in different but similar situations — speak to the need for warning, and the need to prevent unbridled discretion on the part of law enforcement officers.

Judge Letts' "common sense" reaction to the circumstances presented here is similar to that of numerous trial judges in this district who have made similar observations while both granting and denying motions to suppress in bus search cases. For instance, in the order challenged in *McPherson v. State,* No 87-2226 (Fla. 4th DCA), Judge Carl Harper, although denying a motion to suppress on the authority of *Rodriguez v. State,* 494 So.2d 496 (Fla. 4th DCA 1986), expressed serious concerns about the police conduct in his order:

> In so ruling, I have some strong personal reservations about the drug interdiction program described herein, in spite of the fact that drug smuggling is a major problem in our society today. The procedure is inherently intrusive on a person's right of privacy. It invites abuse and tends to diminish fourth amendment protections. For example, how many times must a person be confronted with this procedure while he is traveling from Miami to New York City? And, where will it all end, i.e., can it be used on board airlines during a layover? Can police officers go through a neighborhood, knocking on doors and asking for consent

to search houses and contents in their war against drugs?

It is in cases like this that we must confront the question of whether our system of government is really that different from systems prevailing in other countries where the routine boarding of public transportation and confrontation of passengers by police officers is accepted without questioning. In my view our system is different, and better, because we indeed value our right of privacy, our right to be let alone, and we are willing to pay a heavy price to protect that right, including the abuse of that right by those who disseminate the poison of illegal drugs among us. Ultimately, perhaps, one of the greatest harms inflicted on our society by those persons will be the loss of personal freedom forfeited voluntarily by many in desperation and frustration at our inability to otherwise solve the "drug problem" within our own society.

Miguel MENDEZ, Appellant,

v.

STATE of Florida, Appellee.

No. 4-86-1210.

District Court of Appeal of Florida,
Fourth District,

Nov. 16, 1988.

PER CURIAM.

Affirmed on authority of *State v. Avery*, 531 So.2d 182 (Fla. 4th DCA 1988)(en banc).

DOWNEY, DELL and STONE, JJ., concur.

Michael MCBRIDE, Appellant,

v.

STATE of Florida, Appellee.

District Court of Appeal of Florida
Fourth District

Dec. 28, 1988.

PER CURIAM.

We affirm on the authority of *Avery v. State*, 531 So.2d 182 (Fla. 4th DCA 1988).

HERSEY, C.J., and LETTS and GLICKSTEIN, JJ., concur.

Joseph SERPA, Appellant,

v.

STATE of Florida, Appellee.

No. 88-2454.

District Court of Appeal of Florida,
Fourth District

April 26, 1989.

PER CURIAM.

AFFIRMED.

We certify to the supreme court the same question as certified in *State v. Avery*, 531 So.2d 182 (Fla. 4th DCA 1988), as a question of great public importance:

> MAY EVIDENCE OBTAINED AS A RESULT OF DEFENDANT'S CONSENT TO SEARCH, BE SUPPRESSED BY THE TRIAL COURT AS "COERCED" UPON THE SOLE GROUND THAT THE OFFICER(S) BOARDED A BUS (OR OTHER PUBLIC TRANSPORT) AND RANDOMLY SOUGHT CONSENT FROM PASSENGERS?

DELL, WALDEN and POLEN, JJ., concur.

Tyrone E. SHAW, Appellant,

v.

STATE of Florida, Appellee.

District Court of Appeal of Florida,
Fourth District.

No. 88-3019.

May 31, 1989.

PER CURIAM.

We affirm the appellant's conviction and sentence on the authority of *State v. Avery,* 531 So.2d 182 (Fla. 4th DCA 1988), and certify to the supreme court the same question of great public importance which we certified in *State v. Avery.*

AFFIRMED.

ANSTEAD, GUNTHER, and WARNER, JJ., Concur.

APPENDIX C

Michael MCBRIDE, Petitioner,

vs.

STATE of Florida, Respondent.

Supreme Court of Florida

Case No. 73,514

November 30, 1989.

(BARKETT, J.) We have for review *McBride v. State* 535 So.2d 692 (Fla. 4th DCA 1988), in which the district court affirmed on authority of *State v. Avery,* 531 So.2d 182 (Fla. 4th DCA 1988). In *Avery,* the district court certified the following question to be of great public importance:

> May evidence, obtained as a result of a defendant's consent to search, be suppressed by the trial court as "coerced" upon the sole ground that the officer(s) boarded a bus (or other public transport) and randomly sought consent from passengers?

Id. at 188. We have discretionary jurisdiction. Art. V., § 3(b)(4), Fla. Const. For the reasons expressed in *Bostick v. State,* 554 So.2d 1153 (Fla. 1989), we answer the certified question, as rephrased therein, in the affirmative, quash the opinion of the district court and remand to the district court for proceedings consistent with *Bostick.*

It is so ordered. (ERHLICH, C.J., and SHAW and KOGAN, JJ., Concur. GRIMES, J., Dissents with an opinion in which OVERTON and McDONALD, JJ., Concur.)

(GRIMES, J., dissenting) I dissent for the reasons expressed in my dissenting opinion in *Bostick v. State*, 554 So.2d 1153 (Fla. 1989). OVERTON and McDONALD, JJ., Concur.

Miguel MENDEZ, Petitioner,

v.

STATE of Florida, Respondent.

Supreme Court of Florida

Case No. 73,447.

November 39, 1989.

(BARKETT, J.) We have for review *Mendez v. State*, 534 So.2d 774 (Fla. 4th DCA 1988), in which the district court affirmed on authority of *State v. Avery*, 531 So.2d 182 (Fla. 4th DCA 1988). In *Avery*, the district court certified the following question to be of great public importance:

> May evidence obtained as a result of defendant's consent to search, be suppressed by the trial court as "coerced" upon the sole ground that the officer(s) boarded a bus (or other public transport) and randomly sought consent from passengers?

We have discretionary review. Art. V, § 3(b)(4), Fla. Const. For the reasons expressed in *Bostick v. State*, 554 So.2d 1153 (Fla. 1989), we answer the certified question, as rephrased therein, in the affirmative, quash the opinion of the district court, and remand to the district court for further proceedings consistent with *Bostick*.

It is so ordered. (EHRLICH, C.J., and SHAW and KOGAN, JJ., Concur. GRIMES, J., Dissents with an opinion, in which OVERTON and McDONALD, JJ., Concur.)

(GRIMES, J., dissenting.) I dissent for the reasons expressed in my dissenting opinion in *Bostick v. State*, 554 So.2d 1153 (Fla. 1989). (OVERTON and McDONALD, JJ., Concur.)

Adrian AVERY, Petitioner,

v.

STATE of Florida, Respondent.

Supreme Court of Florida

Case No. 73,289

November 30, 1989.

(BARKETT, J.) We have for review *State v. Avery*, 531 So.2d 182, 188 (Fla. 4th DCA 1988), in which the district court certified the following question to be of great public importance:

> May evidence, obtained as a result of defendant's consent to search, be suppressed by the trial court as "coerced" upon the sole ground that the officer(s) boarded a bus (or other public transport) and randomly sought consent from passengers?

We have discretionary jurisdiction. Art. V., § 3(b)(4), Fla. Const. For the reasons expressed in *Bostick v. State*, 554 So.2d 1153 (Fla. 1989), we answer the certified question, as rephrased therein, in the affirmative, quash the opinion of the district court, and remand to the district court for proceedings consistent with Bostick.

It is so ordered. (ERHLICH, C.J., and SHAW and KOGAN, JJ., Concur. GRIMES, J., Dissents with an opinion in which OVERTON and McDONALD, JJ., Concur.)

(GRIMES, J., dissenting) I dissent for the reasons expressed in my dissenting opinion in *Bostick v. State,* 554 So.2d 1153 (Fla. 1989). OVERTON and McDONALD, JJ., Concur.

Joseph SERPA, Petitioner,

vs.

STATE of Florida, Respondent.

Supreme Court of Florida

Case No. 74,145

November 30, 1989.

(BARKETT, J.) We have for review *State v. Avery,* 531 So.2d 182, 188 (Fla. 4th DCA 1989), in which the district court certified the following question to be of great public importance:

> May evidence, obtained as a result of defendant's consent to search, be suppressed by the trial court as "coerced" upon the sole ground that the officer(s) boarded a bus (or other public transport) and randomly sought consent from passengers?

We have discretionary jurisdiction. Art. V., § 3(b)(4), Fla. Const. For the reasons expressed in *Bostick v. State,* 554 So.2d 1153 (Fla. 1989), we answer the certified question, as rephrased therein, in the affirmative, quash the opinion of the district court, and remand to the district court for proceedings consistent with *Bostick.*

It is so ordered. (ERHLICH, C.J., and SHAW and KOGAN, JJ., Concur. GRIMES, J., Dissents with an opinion in which OVERTON and McDONALD, JJ., Concur.)

(GRIMES, J., dissenting) I dissent for the reasons expressed in my dissenting opinion in *Bostick v. State*, 554 So.2d 1153 (Fla. 1989). OVERTON and McDONALD, JJ., Concur.

Tyrone E. SHAW, Petitioner,

vs.

STATE of Florida, Respondent.

Supreme Court of Florida

Case No. 74,398

November 30, 1989.

(BARKETT, J.) We have for review *Shaw v. State*, 543 So.2d 469 (Fla. 4th DCA 1989), in which the district court affirmed Shaw's conviction and sentence on the authority of *State v. Avery*, 531 So.2d 182 (Fla. 4th DCA 1988), and certified the same question as it certified in *Avery*. We have discretionary jurisdiction. Art. V., § 3(b)(4), Fla. Const. For the reasons expressed in *Bostick v. State*, 554 So.2d 1153 (Fla. 1989), we answer the certified question, as rephrased therein, in the affirmative, quash the opinion of the district court, and remand to the district court for proceedings consistent with *Bostick*.

It is so ordered. (EHRLICH, C.J., and SHAW and KOGAN, JJ., Concur. OVERTON, McDONALD and GRIMES, JJ., Dissent.)